Supreme Court of the United States

OCTOBER TERM, 1955

No. 48

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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MISCELLANEOUS

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Opinions Below

The opinion of the Court of Appeals has not yet been reported. It appears at R. 2078.[1] The Report of the Subversive Activities Control Board (hereafter called the Board) has been published as Sen. Doc. No. 41, 83d Cong., 1st Sess. It appears at R. 1.

[1] "R." refers to the printed record. "Tr." refers to the transcript of the proceedings before the Board, which has been filed with the Court by order of the court below and pursuant to Rule 21(3). "A.G. Ex." refers to an exhibit offered by the Attorney General in the proceeding before the Board. "C.P. Ex." refers to an exhibit offered in that proceeding by the petitioner herein.

Jurisdiction

The Court has jurisdiction under section 14(a) of the Subversive Activities Control Act of 1950,[2] 64 Stat. 987, 1001, 50 U. S. Code, sec. 793(a), and 28 U. S. Code, sec. 1254.

Statutes Involved

The pertinent provisions of the Subversive Activities Control Act, as amended, the Immigration and Nationality Act, and the Communist Control Act of 1954, are set forth in the Appendix.

Questions Presented

1. Whether the provisions of the Act relating to Communist-action organizations and their members, by themselves and as supplemented by section 5 of the Communist Control Act, are unconstitutional on their face or as applied in this case.

2. Whether the Board and the court below erroneously interpreted and applied the evidentiary criteria of section 13(c) of the Act.

3. Whether the order of the Board and the decision below are erroneous because they rest on alleged conduct of petitioner which admittedly had been discontinued prior to the enactment of the Act.

4. Whether the Board and the court below applied the Act in violation of the First Amendment.

5. Whether the court below, having set aside or invalidated key findings on which the Board based its order, erred

[2] The Subversive Activities Control Act, as amended, is hereafter referred to as the Act. It is Title I of the Internal Security Act of 1950.

in failing to remand the proceeding for administrative redetermination.

6. Whether petitioner was denied a fair hearing because the members of the Board were subjected to and influenced by extra-legal pressures to decide against it, and because of the refusal of the Board to disqualify two of its members upon petitioner's affidavits of bias and prejudice.

7. Whether the order of the Board should have been set aside because the administrative hearing was conducted in part by "recess" appointees whose appointments were invalid or had expired under article 2, section 2, clause 3 of the Constitution.

8. Whether it appears from the face of the Report of the Board and the decision below that the findings of the Board were not supported by the preponderance of the evidence.

9. Whether the court below and the Board erroneously interpreted and applied the Act's definition of "world Communist movement".

10. Whether the findings and order of the Board are unsupported by the preponderance of the evidence.

11. Whether the denial by the court below of petitioner's motion to adduce additional evidence violated section 14 of the Act and was an abuse of discretion.

Preliminary Statement

This case presents for review a decision of the Court of Appeals (Judge Bazelon dissenting) affirming an order of the Board that the petitioner register as a Communist-action organization under section 7 of the Act. It raises questions of first impression concerning the constitutionality of the Act and its application by the Board and the court below.

These questions are of far-reaching public importance. The Act imposes an unparalleled regimentation of speech, press and assembly. It establishes a pervasive censorship over all dissenting expression. It suppresses voluntary association and collective activity for constitutionally protected objectives. It outlaws organizations for peaceful political opposition. It denies individuals their livelihood and otherwise punishes them for innocent association. It prohibits foreign travel and penalizes communication abroad for lawful purposes. In the name of anti-Communism, it is an enabling act for the establishment of a totalitarian state.

Inevitably, the Act employs police state techniques to achieve its police state objective. It revives the despotic principle of legislative determination of guilt. It establishes arbitrary and irrational standards of proof. It provides for adjudication by a biased administrative tribunal whose sole function is to implement the predetermined verdict. It coerces self-incrimination.

The impact of the Act as a whole upon American liberties is greater than its separate invasions of constitutional rights. In the totality of its provisions, the Act has no legislative counterpart in our history. Ostensibly, its target is the Communist Party and the system of political thought which it represents. But Communists are only its first victims. The Act authorizes the proscription of every organization which does not conform to authoritarian standards of political orthodoxy, and the punishment of its members as heretics. Its terms and the principles which it establishes deny the protection of the First Amendment to all Americans and impose a system of thought control upon the whole people.

The police state character of the Act has been widely recognized. For more than two years, popular opposition blocked the enactment of proposals for such legislation

advanced by the House Committee on Un-American Activities.[3]

President Truman sharply condemned the Act, first in a message to the Congress while it was being debated, and then in a veto message. Nevertheless, Congress passed the Act over the President's veto in the repressive atmosphere which accompanied the outbreak of the Korean War.

In his first message, the President stated (H. R. Doc. No. 679, 81st Cong., 2d Sess., pp. 5-6):

> "Once a government is committed to the principle of silencing the voice of opposition, it has only one way to go, and that is down the path of increasingly repressive measures, until it becomes a source of terror to all its citizens and creates a country where everyone lives in fear.
>
> "We must, therefore, be on our guard against extremists who urge us to adopt police state measures. Such persons advocate breaking down the guarantees of the Bill of Rights in order to get at the Communists. They forget that if the Bill of Rights were to be broken down, all groups, even the most conservative, would be in danger from the arbitrary power of the government.

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[3] The opponents included the A.F. of L., C.I.O., Brotherhood of Railroad Trainmen, National Farmers Union, Society of Friends, American Unitarian Association, National Fraternal Council of Negro Churches, American Civil Liberties Union, Americans for Democratic Action, American Association of University Professors, National Association for the Advancement of Colored People, Council for Social Action of Congregational Christian Churches, United Council of Church Women, American Jewish Congress, Women's International League for Peace and Freedom, National Council of Jewish Women, American Veterans Committee, National Community Relations Advisory Council, many distinguished individuals, more than twenty major newspapers, and numerous local groups. Hearings before House Committee on Un-American Activities, H.R., 81st Cong., 2d Sess., on H.R. 3903 and 7595; Hearings before the Committee on the Judiciary, Sen., 80th Cong., 2d Sess., on H.R. 5852; Cong. Rec. 81st Cong., 2d Sess., pp. A6135, A6220-21, A6724-26, A7397, A7266, A7275-81; see R. 185.

> "Legislation is now pending before the Congress which is so broad and vague in its terms as to endanger the freedoms of speech, press and assembly protected by the first amendment. Some of the proposed measures would, in effect, impose severe penalties for normal political activities on the part of certain groups, including Communists and Communist Party-line followers. This kind of legislation is unnecessary, ineffective, and dangerous."

In his veto message, the President added (H. R. Doc. No. 708, 81st Cong., 2d Sess., p. 5):

> "Unfortunately, these [registration] provisions are not merely ineffective and unworkable. They represent a clear and present danger to our institutions."

This proceeding directly involves the constitutional rights of Communists. But, as the President said in his veto message (*id.*, pp. 6-7):

> "Obviously, if this law were on the statute books, the part of prudence would be to avoid saying anything that might be construed by someone as not deviating sufficiently from the current Communist-propaganda line. And since no one could be sure in advance what views were safe to express, the inevitable tendency would be to express no views on controversial subjects."

Events since the passage of the Act have more than confirmed the fears expressed by President Truman. The anti-Communist drive of which the Act is a part has not only claimed thousands of non-Communists as its immediate victims, but is devastating freedom of expression and association for all.

The Board's application of the Act magnified its unconstitutional features and set a pattern for the wholesale repression of American liberties.

The disposition of this case will determine whether traditional American liberties, already severely restricted, will survive.

Statement of the Case

The Act was enacted on September 23, 1950. On November 22, 1950, the Attorney General filed with the Board a petition for a registration order against the petitioner herein (R. 143). Evidence was taken before a panel of Board members, originally three in number, reduced to two when Congress adjourned without action on the nomination of the panel chairman (R. 1).

On April 20, 1953, the Board issued its order (R. 138) and an accompanying Report (R. 1) in which, as required by section 13(j) of the Act, it stated its findings. In the Report, the Board made findings adverse to the petitioner herein under each of the eight standards provided by section 13(e) of the Act as a guide to Board decision. On the totality of these findings, the Board made its ultimate finding that the petitioner herein is a Communist-action organization as defined by section 3(3) of the Act.

We discuss the evidence and the findings of the Board at appropriate points in the argument (*infra*, Parts Two and Four).

In the course of the argument we also discuss the pressures exerted on the Board by the Senate Judiciary Committee and the refusal of the Board to disqualify two Board members on affidavits of bias and prejudice, filed by petitioner in accordance with section 7(a) of the Administrative Procedure Act, 5 U. S. C. 1006(a), made applicable to the proceeding by section 16 of the Act. (See *infra*, pp. 178-85.)

The court below set aside two of the eight key findings on which the Board had based its order on the ground that they were not supported by a preponderance of the evidence. Moreover, under the court's interpretation of the Act, the Board made erroneous use of a third key finding. (See *infra*, pp. 175-77.) Nevertheless, the court affirmed the Board's order.

While the proceeding was pending before the court below, petitioner moved pursuant to section 14 of the Act for leave to adduce additional evidence before the Board. By this motion petitioner offered to prove that subsequent to the conclusion of the proceeding before the Board two of the Attorney General's principal witnesses had committed perjury in other proceedings; that a third had admitted a course of perjury; and that public disclosures of their untrustworthiness had caused the Attorney General to cease to employ these persons as witnesses. The motion was denied by the court without opinion, Judge Bazelon not participating. (See *infra*, pp. 212-16.)

Summary of Argument

ONE

The Act is unconstitutional on its face.

I. A. The Act is an outlawry statute, not a disclosure measure. It inflicts intolerably severe sanctions and consequences upon an organization ordered to register and upon its members. It requires the organization to defame itself and its members as participants in a foreign-controlled seditious conspiracy and quarantines them. The members are deprived of rights to public and private employment, of naturalized citizenship, and of the right to travel abroad. These sanctions apply whether or not registration occurs. Registration is incompatible with survival and, moreover, is made impossible by the vague and loose definition of "membership" in petitioner contained in section 5 of the Communist Control Act. Failure to register, however, is punishable by severe criminal penalties. Thus the effect of a registration order is to destroy or outlaw the organization whether or not it attempts to comply with the registration requirement.

The Act is not, and was not meant to be, a disclosure statute. Disclosure legislation does not impose destructive

penalties on those who comply by registering, nor does it make registration a self-exposure to onerous criminal and civil penalties created by the legislation itself.

B. 1. The legislative history of the Act shows that it was intended to outlaw petitioner as a criminal organization without proof that it is such. The legislative history shows:

(a) The sponsors of the legislation intended to outlaw petitioner (and subsequently other organizations) by requiring it to register as a seditious foreign agent.

(b) There already existed laws requiring foreign agents and seditious organizations to register, as well as punishing seditious activity and advocacy. But these laws could not serve the purpose because they required proof of violation. Such proof, as the authors of the legislation, the Congressional committees, and the Attorney General were aware and stated, was not available against petitioner.

(c) On the other hand, the sponsors of the legislation recognized that it would be unconstitutional for a law to specify the petitioner by name as an organization required to register as a seditious foreign agent.

The Act represents the sponsors' attempt to resolve this dilemma. In order to avoid its first horn—the invalidity of a legislative verdict of guilt against petitioner by name—the Act provides that the identity of the guilty organization shall be determined administratively. In order to avoid the second horn—the absence of evidence of guilt—the Act rigs the administrative procedure by three devices: (1) it predetermines the case by legislatively making the findings of fact prerequisite to entry of a registration order against petitioner; (2) it sets up vague and irrational standards of proof for the administrative adjudication; (3) it creates as the adjudicative body a Board which is necessarily biased against petitioner and has an interest in deciding against it.

2. The predetermination device has three aspects.

Under section 3(3), a Communist-action organization is defined as one which (a) is substantially controlled by the foreign power which controls "the world Communist movement referred to in section 2" and (b) operates primarily to advance the objectives of that movement "as referred to in section 2." Accordingly, there can be a Communist-action organization only if there is a world Communist movement of the character described in section 2. However, as the court below held and the Board conceded, neither the Board nor the reviewing court is authorized to determine the existence and nature of such a movement. Instead, these "facts" are found legislatively in section 2 and are then incorporated into section 3(3) as assumptions of fact which the Board and the courts must accept. Moreover, these essential "facts" are also presupposed by the criteria of section 13(e), which the Board is obliged to apply in making its decision.

Secondly, section 2 makes findings on other elements of the section 3(3) definition. These include findings that there is a Communist-action organization in the United States, that "the Communist movement in the United States" is that organization, and that it has characteristics which delineate a Communist-action organization under the criteria of section 13(e). The Board could not make contrary determinations without overruling Congress and the findings which justify the Board's creation.

Thirdly, Congress even predetermined the specific identification of petitioner as the domestic Communist-action organization. This appears from the debates and the reports and from the fact that the section 2 description of the Communist-action organization in the United States contains verbatim excerpts from Judge Hand's description of petitioner in the *Dennis* case. This Court in *Carlson* v. *Landon* held that section 2 refers to petitioner.

3. The device of irrational and vague standards is employed in section 13(e), which provides eight criteria for the Board to consider in making its decision. As the court below held and the Board admitted, none of these criteria (which were the only ones applied by the Board) is relevant to the objectives component of section 3(3)—i.e., that a Communist-action organization advances the objectives attributed by section 2 to the world Communist movement, all of which are seditious. The 13(e) criteria do not call for proof that the organization advances any seditious objectives, much less those specific seditious objectives attributed to the world Communist movement. As to the foreign control component of the section 3(3) definition, the tests supplied by 13(e) are nebulous, circumstantial, and largely irrelevant. This becomes plain when each is examined.

Section 13(e) thus perverts the function of the orthodox legislative enumeration of guides for administrative determination. Instead of giving more definite content to a generalized ultimate standard, it unsettles the definite ultimate standard of section 3(3) and authorizes petitioner's conviction of one thing on proof of another.

4. The third device of the Act is its creation of a Board which is necessarily biased against petitioner and whose members have a personal interest, financial and otherwise, in deciding against petitioner.

The Board's sole function is to identify Communist-action organizations, their members, Communist-front organizations, and (since enactment of the Communist Control Act) Communist-infiltrated organizations. By definition, there can be no front or infiltrated organizations in the absence of an action organization. The only Communist-action organization envisaged by the Act is the petitioner, as both the Attorney General and the Board have recognized. The Board, therefore, could not decide in favor of petitioner without rendering itself *functus officio*, and, in effect, repealing the Act. Irresistible pressure was thus generated

by the Act upon the agency to decide in the only way which would preserve the Act and the agency—i.e., against petitioner.

Moreover, the members of the Board had a personal interest in ruling against petitioner so as to preserve further business for themselves. By ruling otherwise they would lose their jobs, salaries, and appointment patronage. The Board's staff had a similar job interest in seeing that the order was adverse to petitioner.

II. The Act violates the due process prohibition against fiat legislation. Since the order of the Board deprives petitioner and its members of liberty and property it may not constitutionally be entered without a hearing. If any of the elements requisite to a determination of liability are found legislatively, rather than in the hearing, due process is violated. The Act contravenes this principle of due process in two respects.

First, as was decided below and conceded by the Board, there has been a legislative predetermination of the existence, objectives and nature of the world Communist movement, which is binding on the Board and the courts. Under section 3(3), the facts concerning the world Communist movement are adjudicative facts essential to proof of the ultimate issue. Therefore due process requires that petitioner be allowed to litigate these facts. Yet the Act precludes it from doing so.

Secondly, as already seen, the Act not only legally predetermines the facts concerning the world Communist movement, but also finds the existence of a domestic organization having the characteristics of a Communist-action organization and identifies petitioner as that organization. While findings as to these facts are ostensibly left to administrative determination, obviously the Board is under compelling pressure not to overrule the Congressional findings. In fact, therefore, the Act removes these issues from

independent adjudication. Hence due process is violated in this respect as well.

III. The Act is invalid as a bill of attainder, which is by definition a legislative act inflicting punishment without a judicial trial. This is true even disregarding the fact that the Act by legislative fiat determines petitioner's guilt and identifies petitioner and its members as objects of its sanctions. The Act gives only an administrative hearing, not a judicial trial. Administrative hearings satisfy constitutional requisites for the purpose of "regulation", but a judicial hearing is a constitutional prerequisite to the infliction of "punishment". The Act is, therefore, a bill of attainder if it "inflicts punishment".

The Act and the registration order do impose "punishment", as distinguished from "regulation", on the organization and its members, who are identified by the registration order. Since the Act makes registration an impossible course, there can be no "regulation" through disclosure. The cumulative impact of the the Act prevents an organization ordered to register from engaging in any activity, however, innocent, and does not merely confine it to non-deleterious conduct. It imposes a death sentence, and this is obviously penal. The sanctions against the organization and its members, when examined individually, are also of a punitive, not regulatory, nature. Their sole function is to inflict injury rather than to serve a public interest by restricting activity to permissible limitations, and the disabilities imposed on members have no reasonable relation to the fitness of the members to utilize or enjoy the privileges of which they are deprived.

IV. Section 13(e) establishes rules of evidence which authorize the Board to infer that an organization is a Communist-action organization from the fact that it engages in some or all of eight practices. As already seen, these practices are not relevant to the ultimate issues defined by section 3(3). The presumptions established by 13(e) therefore violate due process.

Congress' power to prescribe rules of evidence and presumptions is limited by the due process principles that there must be a rational connection between the fact to be proved and the fact presumed, and that the presumption must not be conclusive. The Act violates both these principles. The Act is invalid if only because of the single irrationality that although one component of the section 3(3) definition is that a Communist-action organization advances the seditious objectives attributed by section 2 to the world Communist movement, section 13(c) admittedly authorizes issuance of a registration order without any proof that the accused organization promotes those objectives.

In addition, the vagueness of section 13(c) permits decision according to the subjective prejudices of the Board, and thus violates due process and constitutes an invalid delegation of legislative power.

V. As already seen, the Board could not have decided in favor of petitioner without rendering itself *funcius officio* and, in effect, repealing the Act. Moreover, the Board members had a job interest in ruling against petitioner. The Act thus violates the due process requirements of a fair hearing, before an impartial tribunal, which has no interest in the event.

VI. The Act imposes severe sanctions and disabilities on petitioner's members. Since these directly affect and injure petitioner, petitioner has standing to challenge their constitutionality.

The sanctions on the members violate due process because (1) they are imposed for association, not for personal misconduct; (2) they apply regardless of the individuals' lack of knowledge of the organization's claimed illicit purposes; (3) they establish a conclusive disqualification and do not permit a member to prove that he is a fit person to enjoy the privileges of which he is deprived; (4) they

are arbitrary and have no real and substantial relation to any legitimate federal objective.

VII. If the Board's order becomes final, petitioner and its officers must determine the names of petitioner's members in order to list them in the registration statement required by the Act. Other persons must determine whether they are members of petitioner in order to know whether they may lawfully hold certain jobs, apply for passports, and obtain naturalization, and whether they must register themselves upon failure of the organization to list their names in a registration statement.

If criminal liability is to be avoided, those required to determine membership must do so in accordance with section 5 of the Communist Control Act, which sets forth the criteria for determining membership in petitioner. Section 5, however, prescribes such vague and irrational criteria that it is impossible for petitioner, its officers or others to determine the identity of petitioner's "members". Moreover, the application of these criteria requires a knowledge of facts which petitioner and its officers cannot have or obtain. These facts clearly appear from examination of section 5 as a whole and of the criteria separately.

Section 5 thus unsettles and invalidates the Act as a whole, including the registration requirements.

VIII. The Act violates the privilege against self-incrimination since a registration order against petitioner compels admissions of membership or office-holding in the Communist Party and of participation in the alleged criminal conspiracy described in section 2 of the Act.

The immunity conferred by section 4(f) does not extend to all matters which the compelled admissions in a registration statement concern. Hence the immunity is not coextensive with the constitutional privilege and cannot save the Act.

The rule that the privilege is not available against compulsion to produce an organization's records does not apply. The Act requires the preparation and filing of original statements. These statements need not even be derived from records. Furthermore, the rule as to records applies where incrimination may result from the contents of the records. Here the incriminating admission consists in the act of signing the registration statement, which identifies the signer as an officer of petitioner.

Adjudication of the question of privilege is not premature in this proceeding. It cannot await an assertion of the privilege by petitioner's officers, for the Act allows them no opportunity or place to assert the privilege prior to prosecution for not registering. Furthermore, a claim of the privilege in advance of prosecution would itself be incriminating by identifying the claimant as an officer of petitioner. If the privilege, as it must, is to be available against prosecution as well as conviction, this proceeding provides the only opportunity for its assertion.

IX. The most fundamental vice of the Act is its violation of the First Amendment.

A. A statute penalizing conduct outside of the area protected by the First Amendment may not be so broad as to abridge protected expression or assembly as well. The Act infringes this principle of economy. Its controls are not limited to the regulation or exposure of the alleged seditious and criminal activity described in section 2. Instead, it suppresses all of petitioner's activity, including its admittedly extensive peaceable advocacy and assembly. It is precisely such protected conduct and expression which the Act is designed to reach.

The Act also violates the principle that government may not intervene in the political process by imposing special disabilities on any political group.

The constitutional principles which the Act violates have been applied specifically to the Communist Party and its

members, in holdings of the Court that peaceable assembly and advocacy of Communists could not be abridged even if it were assumed that the Party engaged in illicit advocacy and activity.

The invalidity of the Act was foreshadowed by *American Communications Association* v. *Douds*, which recognizes that Congress may not outlaw petitioner or impose onerous burdens on membership in it.

The Act is not rescued by the section 2 finding that "the Communist organization in the United States * * * presents a clear and present danger." Determination of a clear and present danger is a judicial function, to be made on a case by case basis in the light of the particular expression and the circumstances of its utterance. Legislation of a future, permanent clear and present danger is a contradiction in terms. Furthermore, the clear and present danger exception is confined to advocacy within the exception. It cannot be applied to an organization as a whole, so as thereby to allow suppression of its peaceable advocacy.

Even if the major sanctions of the Act are abstracted from their setting, each violates the First Amendment. The government employment sanction applies to non-sensitive jobs and excludes considerations of scienter, personal innocence and fitness. The sanction with respect to employment in "defense facilities" has the same defects. It is also invalid because it delegates unfettered and unreviewable authority to the Secretary of Defense to designate any private enterprise as a "defense facility". The provision that it is unlawful for employees of the government or of "defense facilities" to contribute to a Communist organization applies without regard to the purpose or use of the contribution, and prohibits subscription to any publication of the organization regardless of the publication's nature and contents. The sanction against trade-union employment is not limited to the area of interstate commerce and applies to non-sensitive and even menial jobs. The passport sanction prohibits travel for legitimate purposes. The denaturalization sanction causes forfeiture of citizenship

solely for association, no matter how innocent. The provision requiring labelling of mail and broadcasts abridges press and speech regardless of the content of the expression.

B. The Act imposes a prior restraint on First Amendment rights by requiring registration and labelling as a condition to the exercise of rights of advocacy, press, and assembly. This is clearly invalid under *Thomas* v. *Collins*.

The registration statement requires a public listing of members. Yet anonymity of membership in unpopular groups, and especially in minority parties, is indispensable to freedom of political action. Subjection of a minority party to discriminatory "disclosure" requirements destroys the electoral process.

C. The Act also violates the First Amendment because it imposes its sanctions on the basis of protected advocacy and views. The evidentiary standards of section 13(e) focus on views, expressions, and policies. These views, policies and expressions need not be dangerous, much less creative of a clear and present danger. They may be objectively true and in the interests of the American people. The Act thus imposes a political censorship, creating the strangest and most virulent of all heresies, "non-deviation", including "non-deviation" from the truth.

The sanctions on members of the organization are invalid because they penalize innocent association. Section 5 of the Communist Control Act carries the vices of the Act still further by utilizing protected expression and association to identify persons who are to be victimized as "members" of petitioner.

If the Act is sustained, there remain no effective limitations on Congress' control over political expression and association.

TWO

The Board and the court below applied the Act erroneously and in violation of the Constitution.

I. A. A detailed examination of the Board's application of each of the standards of 13(e) shows that the Board violated the Act by employing irrational interpretations of 13(e) and by relying on irrelevant matters.

B. The court below sustained the ultimate finding of the Board on the basis of six factors, which sum up to the facts that petitioner believes in the principles of Communism, advocates the ultimate objective of a classless, stateless world, calls itself the Communist Party of the United States, and has adopted views on certain questions of foreign policy which are similar to views of the Soviet Union. None of these facts has any tendency to prove the criteria of section 13(e) or the ultimate issue under section 3(3).

II. The Board's order and the decision below violate the Act because they rest on alleged conduct of petitioner which, if it ever took place, had been discontinued prior to enactment of the Act.

The issue under the Act was whether petitioner was a Communist-action organization at the time of the administrative proceeding, or, in any event, after September 23, 1950, the enactment date of the Act. Evidence of conduct prior to that date was relevant only so far as it explained the significance and purpose of post-Act activity.

The Board's Report indiscriminately commingles discussion of a few alleged contemporary practices with discussion of alleged episodes of the remote past, mostly relating to the period before 1940 when petitioner was affiliated with the Communist International.

The Report cites no evidence of post-Act conduct which can conceivably support a registration order. As to two of the eight standards of section 13(e) ("financial aid" and "training"), the Report concedes that there is no post-Act evidence. As to a third ("reporting"), none of the evidence relied on by the Board relates to the post-Act period. The Report itself shows that these three practices, if ever engaged in, were discontinued long before enactment of the Act. As to the remaining five standards, the post-Act evidence relied on by the Board consists of a handful of absurdly irrelevant incidents and writings.

The six factors which the court below regarded as determinative likewise do not involve relevant post-Act conduct. The only current matters to which they refer are petitioner's adherence to the ultimate objective of a classless, stateless world and its advocacy of various international policies similar to those supported by the Soviet Union.

The Board and the court below invoked a presumption of continuance to compensate for the absence of current evidence. Continuance cannot be presumed in the face of petitioner's uncontradicted testimony and of such changed circumstances as petitioner's disaffiliation from the Communist International and the latter organization's dissolution. Nor can it be presumed that conduct which was permissible when it occurred continued after enactment of legislation imposing sanctions for such conduct.

III. The Board rested, and the court below affirmed, the registration order primarily on the basis of petitioner's advocacy respecting current issues and its adherence to the principles of Marxism-Leninism. In so doing the Board and the court magnified the vice inherent in the Act that it violates the First Amendment by imposing sanctions for peaceable advocacy and association.

There is no suggestion that petitioner advocates anything but peaceable means to win acceptance of its immediate objectives. Moreover, petitioner's views and advocacy concerning current international and domestic issues present no danger of any evil against which the government may act. Accordingly, the reliance by the Board and the court below on petitioner's peaceable advocacy on current issues requires reversal.

Reversal is also required by the reliance of the Board and the court below on petitioner's adherence to the principles of Marxism-Leninism. The Board's assertion that Marxism-Leninism advocates the violent overthrow of the government is contrary to the evidence and to *Schneiderman* v. *United States,* and was not accepted by the court below. Moreover, the registration order does not merely abridge the right to advocate violent overthrow but suppresses all of petitioner's advocacy. Even advocacy of violent overthrow can be abridged only upon a finding of clear and present danger, and no such finding was made. The thrust of the Report and the opinion below is that petitioner should be ordered to register merely because it believes in the principles of Communism. The First Amendment, however, prohibits imposition of sanctions for belief.

IV. Of the Board's eight key findings on the standards of 13(e), the court below invalidated two—those on "reporting" and "secret practices"—as not supported by the evidence. In addition, the court below held that the "nondeviation" criterion of section 13(e)(2) has no relevance to the "objectives" component of the section 3(3) definition. Yet the Board used its finding on "non-deviation" to support its conclusion on the objectives component, as well as on the foreign control component.

The Board's ultimate conclusion was based on the totality of its eight findings under section 13(e). Two having been invalidated, and a third having been held to have been erroneously applied, it is apparent that the premises on

which the Board acted do not support its ultimate conclusion and order. Moreover, of the five findings which survived, two had little if any weight against petitioner.

The affirmance below thus violates section 14 of the Act, which permits affirmance of a registration order only if the findings of the Board are supported by a preponderance of the evidence. It also contravenes the established principle that an administrative order cannot be sustained except upon the grounds on which it was predicated. It was the duty of the court below to remand the case for administrative redetermination in the light of the court's action regarding three key findings.

THREE

I. Petitioner was denied a fair hearing because of extra-legal pressures applied to members of the Board and the personal bias and prejudice of the Board members. Two Board members should have disqualified themselves on the basis of affidavits of bias and prejudice.

A. The members of the Board were given so-called recess appointments by the President on October 23, 1950. These appointments were held in abeyance by the Senate Judiciary Committee until July 30, 1951. Accordingly, for many months during the pendency of the administrative proceeding the tenure of the Board members was subject to the pleasure of a committee which had reported to Congress that petitioner is a Communist-action organization. During this period, witnesses for the Attorney General reported on the conduct of the proceeding by the Board members to an employee of the Judiciary Committee. Board member LaFollette recognized the existence of the pressures generated in this fashion. These pressures prevented petitioner from receiving a fair hearing.

B. During the course of the hearing, Board member McHale, a member of the panel taking the evidence, made

a speech before the Women's National Democratic Club in which she discussed the proceeding and expressed prejudgment on issues in the case.

After issuance of the panel's recommended decision, and while the proceeding was pending before the full Board, Board chairman Brown and the Board's general counsel, appeared on a radio and television forum, commented on the evidence, expressed satisfaction with the recommended decision, and stated their conviction that petitioner is a Communist-action organization.

McHale and Brown thus acted with gross impropriety and exhibited bias and prejudice against petitioner. The Board erred in refusing to disqualify them on the basis of affidavits of bias and prejudice filed by petitioner.

II. The original appointments to the Board were made in violation of the Constitution, and the acts of the Board members prior to Senate confirmation of their appointments were invalid.

A. The original appointments were made as recess appointments, to the offices which were newly created by enactment of the Act. "Vacancies" do not "happen" under Article 2, sec. 2, cl. 2 of the Constitution in offices newly created by law. And even if "vacancies happened" in the Board upon passage of the Act, they did not happen "during the Recess of the Senate."

B. Furthermore, the appointments were made during an adjournment of the Senate to a day certain. The adjournment was not "the Recess" as used in Section 2, which refers to the sine die recess between sessions. Hence the original appointments were also invalid because when made there were no vacancies during "the Recess."

C. If the adjournment was "the Recess," then it follows that the reconvening of Congress on November 27, 1950 was the beginning of the "next session." In that case, the appointments expired when the "next session" ended with

the sine die adjournment of Congress on January 2, 1951. Hence the appointees to the Board did not hold office from January 2, 1951 until August 9, 1951, when their appointments were confirmed by the Senate.

D. The invalidity of the appointments requires setting aside of the Board's order. The attack on the validity of the appointments is direct, and the point was seasonably raised.

FOUR

I. It appears from the face of the Report and the decision below that the findings of the Board are not supported by a preponderance of the evidence, as required by section 14(a). The Report and the opinion below show: (1) There was no relevant post-Act evidence adverse to petitioner. (2) Two of the Board's key findings were set aside by the court as not supported by the evidence; a third was improperly applied under the court's holding; and petitioner was entitled to favorable findings under three of the 13(e) criteria. (3) There was no relevant evidence to support findings adverse to petitioner under any of the 13(e) criteria as properly construed. (4) The evidence relied on by the Board and the court below does not support the finding that there is a world Communist movement as defined by section 2. (5) The six "basic facts" on which the court below affirmed are irrelevant to both the section 3(3) definition and the 13(e) criteria. (6) The Board's ultimate conclusion rested solely on its findings under 13(e), which, as the court below held, have no relevance to the objectives component of the 3(3) definition. Accordingly, the ultimate finding as to that component is not supported either by the evidence or by subsidiary findings.

II. The Board's finding as to the existence and nature of "the world Communist movement," if authorized by the Act, is not supported by the evidence. Section 2 defines that movement in terms of organizational form, source of control, objectives, and means. There is no evidence to establish any one of these elements as described in section 2, and the Report cites none.

The court below found that there is a world Communist movement in the sense that there are Communist parties in various countries which base their program and activities on a common economic and political outlook and work toward the ultimate achievement of a common social goal—a universal, classless, stateless society. This is not the movement described by section 2.

III. The findings of the Board are based on incompetent and discredited testimony and on misrepresentation of the evidence. The record discloses that the Attorney General's witnesses were unworthy of credence and that their testimony in this proceeding was shot through with fabrications. The Board relied on testimony proven to be false and in some cases repudiated or withdrawn by the witness himself. It ignored all testimony of the Attorney General's witnesses which was favorable to petitioner.

The Board's reliance on incompetent and discredited testimony and its misrepresentation of testimony appears from a comparison of the record with the Report's findings on five subjects which are given major significance in the Report: petitioner's disaffiliation from the Communist International; the reconstitution of the Communist Party; force and violence; financial aid; and representatives of the Communist International.

The Board applied a double standard, rejecting the testimony of petitioner's witnesses even when corroborated and uncontradicted, while eagerly accepting and exaggerating the false testimony of the Attorney General's unreliable witnesses.

IV. The court below erred in denying petitioner's motion for leave to adduce additional evidence. This motion, filed pursuant to section 14, showed that after conclusion of the administrative hearing two of the Attorney General's principal witnesses committed perjury in other proceedings, and a third admitted a course of perjury. The Board

had in numerous instances rested material findings adverse to petitioner on the testimony of these three witnesses.

Under section 14, the hearing must be reopened if proffered new evidence is material. This standard was met by petitioner's motion.

ARGUMENT

PART ONE

THE ACT IS UNCONSTITUTIONAL ON ITS FACE

I. The True Nature of the Act

The Act polices freedom of association and suppresses political non-conformity. In order to conceal its true nature it masquerades under false colors.

The Act poses as a registration or disclosure measure. In fact no organization could survive its kind of "registration," nor does the Act contemplate that any organization will register under it. Instead, the Act is designed to outlaw the Communist Party, and to punish its officers and members solely for their association. The outlawry of petitioner also supplies a foundation for a similar proscription of other organizations, including trade unions, as "Communist-front" or "Communist-infiltrated" organizations.

The Act purports to accord the petitioner a hearing. In fact the hearing is a sham. The Act predetermines petitioner's guilt, establishes spurious standards of proof, and creates a biased tribunal to announce the built-in verdict.

A. The Act Is an Outlawry Statute

The Act provides for administrative proceedings before the Board, upon petitions of the Attorney General, to determine whether or not accused organizations shall be

required to register as Communist-action or Communist-front organizations (sec. 13). The Communist Control Act of 1954 added provisions authorizing the Board, on petition of the Attorney General, to declare trade unions to be "Communist-infiltrated" (3(4A) and 13A of the Act, added by sec. 7 of the Communist Control Act). Such organizations are not required to register, but are deprived of the benefits of the National Labor Relations Act, as amended. The three types of organizations are collectively referred to as "Communist organizations" (sec. 3(5)).

Provision is made for judicial review of the Board's orders by the Court of Appeals and on certiorari by this Court. On review, the Board's findings are conclusive only if supported by the preponderance of the evidence. (Sec. 14.)

A Communist-action organization is defined as one "which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title" (sec. 3(3)).

Thus the definition of a Communist-action organization is tied into findings made in section 2 of the Act, which supply the only definition of "the world Communist movement." Section 2 finds, among other things, that this movement is controlled by the Communist dictatorship of a foreign country and operates through the medium of a world-wide Communist organization. It finds that the movement seeks to overthrow capitalist governments by treacherous and terroristic methods and to establish in their place totalitarian dictatorships subservient to the foreign dictatorship.

A Communist-front organization is defined as an organization which is substantially dominated or controlled by a Communist-action organization and is primarily operated

for the purpose of giving aid or support to a Communist-action organization, a Communist foreign government, or the world Communist movement (sec. 3(4)).

A Communist-infiltrated organization is defined as one which (a) is substantially dominated or controlled by an individual or individuals who are, or within three years have been, engaged in giving support to a Communist-action organization, a Communist foreign government, or the world Communist movement, and (b) is serving, or within three years has served, as a means for giving aid or support to any such organization, government, or movement, or for the impairment of the military or industrial strength of the United States (sec. 3(4A)).

A Communist-action organization is required to register as such with the Attorney General. The registration statement must show the names and addresses of the organization's officers and members during the preceding year, give a detailed accounting of all moneys received and expended, including the source of its revenues and the purposes of its exenditures, and list all printing and duplicating facilities. Annual reports must be filed to keep the registration up to date. The registration statement is open for public inspection. (Sec. 7.)

When a registration order against a Communist-action organization becomes final, as it does on exhaustion of judicial review (sec. 14(b)), its officers have an individual duty to register the organization and to list its members (sec. 7(h)). Members not so listed are under a duty to register themselves after an administrative determination of their membership (secs. 8, 13(a)). Failure to comply with these duties is punishable by imprisonment up to five years, fine up to $10,000, or both. These penalties are potentially astronomical, since each day of failure to register constitutes a separate offense. Any falsity in a registration statement is punishable by a similar penalty. Here too astronomical accumulation is made possible because

each misstatement and each omission is a separate offense. (Sec. 15.)

The listing or self-listing of members of petitioner in compliance with a registration order has been made an impossible task by section 5 of the Communist Control Act. That section enumerates thirteen criteria for determining "membership" in the Communist Party. These are dependent on facts of which the petitioner and its officers can have no knowledge, and are so vague that no one can determine who are "members." (See *infra*, pp. 75-82.)

The entry of a final registration order against a Communist-action organization automatically subjects the organization and its members to crippling sanctions. *These sanctions apply whether or not the organization registers.*

The sanctions are the following:

(1) The organization must label publications and literature which if distributes by mail or in interstate or foreign commerce as being disseminated by a Communist organization, which is by definition a participant in the foreign-controlled seditious conspiracy described in section 2. Its radio and television broadcasts must be announced as sponsored by a Communist organization. These requirements apply without regard to the nature and content of the publications and broadcasts. (Sec. 10.)

(2) It is unlawful for members of the organization to hold non-elective federal employment, employment in any privately owned "defense facility," or office or employment in labor unions; nor may they represent employers in matters arising under the National Labor Relations Act (sec. 5, as amended by sec. 6 of the Communist Control Act). A defense facility is any establishment listed by the Secretary of Defense on his ex parte determination that the security of the United States requires such listing (secs. 3(7), 5(b)).

Accordingly, what employment is open to members of the organization, and, for that matter, whether any employment at all is open to them, rests in the unreviewable fiat discretion of the Secretary of Defense.

(3) Government employees and employees of defense facilities are prohibited from contributing funds or services to the organization, and even from subscribing to any of its publications (secs. 5(a)(2) and 3(6)). Accordingly, the ex parte determination of the Secretary of Defense limits, or may virtually eliminate, the sources from which the organization can obtain funds or services or find readers of its publications.

(4) It is unlawful for members of the organization to apply for or use passports (sec. 6).

(5) Aliens who are or ever have been members of the organization are excluded from admission into the United States, and if already in the country must be deported. An alien may not be naturalized if he was a member of the organization within ten years preceding the filing of his naturalization petition. Naturalized citizens who join or affiliate with the organization within five years after naturalization are subject to revocation of citizenship.[4]

(6) Contributions to the organization are not tax deductible, and the organization itself is denied tax exemptions (sec. 11).

The prohibitions described in the first four paragraphs above are enforceable by criminal penalties of up to five years imprisonment and $10,000 fine (sec. 15).

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[4] Originally contained in secs. 22 and 25 of the Act, these sanctions have been carried forward by secs. 212(a)(28)(E), 241(a)(6)(E), 313(a)(2)(G) and 340(c) of the Immigration and Nationality Act, 66 Stat. 163, 8 U.S.C. 1182, 1251, 1424, 1451.

The sanctions on members apply regardless of their personal innocence or lack of knowledge of the organization's alleged illegal or conspiratorial actions or purposes, and though their activities are confined to constitutionally protected areas.[4a]

The registration order has still other consequences, as follows:

(1) Any person who signs or whose name is listed on a registration statement as an officer or member of, or a contributor to, the organization is in jeopardy of prosecution under the extravagantly vague provisions of section 4(a) of the Act, as well as under the Smith Act and a host of other criminal laws.[5] A registration order, therefore, commands the officers of the organization to incriminate themselves and to become informers on the members. If the officers fail to register the organization, the members are faced with an impossible alternative. If they register, they expose themselves to onerous civil penalties and invite prosecution under the Smith Act and other statutes. If they do not register, they are subject to prosecution for their failure.

(2) The registration order officially brands the organization, its members and contributors, as participants in the seditious conspiracy defined in section 2, and subjects them to public opprobrium and ensuing social and economic reprisals.

[4a] The sanctions against Communist-front organizations and their members differ from the foregoing only in a few ameliorating details.

[5] Section 4(a) of the Act makes it criminal to conspire "to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship" under foreign control. And see *infra*, p. 34, ftn. 8, for a list of other federal criminal statutes which might be invoked against members of a registered organization.

(3) The registration order makes it dangerous for other organizations or persons to associate with the proscribed organization or its members or to support by constitutionally protected means social, economic or political ideas advocated by it. For under the Act's evidentiary criteria of front and infiltrated organizations, an organization which has any dealings with or expresses views similar to those of a Communist-action organization or its members, is itself in danger of being condemned as a front or infiltrated organization (secs. 13(f), 13A(e)). Moreover, under the sweeping criteria of section 5 of the Communist Control Act, any person who has any contact or dealings with the Communist Party or its members may thereby be determined to be a member of the Party, become liable to register as such, incur the other penalties for membership, and jeopardize the status of any organization to which he belongs. (See *infra*, pp. 75-82.) A registration order, therefore, quarantines the organization, depriving it of access to the people and the people of access to the ideas it propagates.

The total impact of the Act is such, therefore, that if the organization registers, it destroys itself and jeopardizes the livelihood and liberty of its members.[6]. If a member registers, he destroys himself. On the other hand, if there is no registration, the organization, its officers and members are subject to severe criminal penalties which cumulate for each day of non-registration. A registration order, therefore, affords an illusory choice between suicide by registration or governmental execution for non-registration.

The character of the Act as an outlawry statute is underscored by the daily cumulative penalties of section 15 for failure to register. This failure is not an ordinary crime

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[6] Furthermore, the organization and its officers incur astronomical criminal penalties for the inevitable "false statements" and "omissions" in the list of members, which are induced by section 5 of the Communist Control Act. See *infra*, pp. 75-82.

which cumulative criminal penalties might deter. It is a course of elementary self-preservation to avoid ruinous consequences. Since self-preservation must have primacy, the threat of cumulative penalties cannot induce self-destruction by registration. The role of the cumulative penalties, therefore, is to exact life-sentences as the price of attempted self-preservation.

The Court has recognized that the effect of an adverse listing by the Attorney General, unaccompanied by the sanctions of the Act, is virtually to destroy the listed organization. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 139, 142, 161, 175.

The assertion that the Act is a disclosure statute is outright hypocrisy. No legitimate disclosure legislation imposes destructive penalties on those who comply with it by registering. Nor does it make the act of registration a self-exposure to onerous criminal and civil liabilities created by the legislation itself.

The registration order, therefore, does not, and was not intended to, result in registration. Its function is to lay a foundation for mass punishment of members of the petitioner and other condemned organizations. Far from accomplishing disclosure, it compels concealment, the only sanctuary left to the organization and its members.[7]

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[7] The Attorney General has acknowledged that the registration order in this case, if sustained, will result in the outlawry or destruction of petitioner. Hearings before Subc. No. 1 of Comm. on Judiciary, H.R. 83rd Cong., 2nd Sess., April 12, 1954, p. 137; and public statement of Attorney General Brownell quoted in 100 Cong. Rec. 14401 (daily pagination). Attorney General Clark, testifying on the Mundt bill, the ancestor of the Act and a far less stringent measure, described the bill as one of "several proposed bills which seek to outlaw communism and the Communist Party." Hearings on Proposed Legislation to Curb or Control the Communist Party of the United States, Subc. on Legislation of Comm. on Un-American Activities, H.R. 80th Cong., 2d Sess., on H.R. 4422 and 4581, p. 17 (hereafter cited as House Hearings).

B. The Act Predetermines Petitioner's Guilt

1. The Legislative History.

The Act purports to require the registration of Communist-action organizations and their members as participants in a foreign-controlled conspiracy to commit espionage, sabotage, treason, violent revolution, etc., on behalf of a foreign power. The activities claimed to supply justification for the registration requirement are already punishable under numerous federal criminal statutes,[8] or if not, could easily be made so. The Act thus establishes a mechanism to prosecute accused persons not for their alleged crimes, but for their failure to register themselves as criminals. The only rational explanation for this shift of the locus of punishment from the crime itself to failure to register as a criminal is that the Act seeks to punish Communists as criminal conspirators even though they are not and cannot be proved to be such. The legislative history and the scheme of the Act show that such is its purpose and effect.[9]

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[8] E.g., the following sections of 18 U.S. Code: 2153-2156 (sabotage); 793-798 (espionage); 2383 (inciting rebellion or insurrection); 2384 (seditious conspiracy); 2385 (advocating forceful overthrow of government); 2381 (treason); 2382 (misprision of treason); 951 (failure to register as foreign agent); 957 (possession of property of a foreign government for use in violating U.S. statute); 2387-2388 (undermining loyalty, discipline or morale of the armed forces); 2386 (failure to register by organizations engaged in civilian military activity, subject to foreign control, affiliated with foreign government, or seeking to overthrow government by force); 1361-1364 (damaging federal property or communications); 1381 (enticing desertion and harboring deserters); 2390 (enlistment to serve against United States).

[9] The bill enacted was the Senate rewrite, sponsored by Senator McCarran, of H.R. 9490, 81st Cong., 2d Sess. (Wood bill). The antecedent bills were: H.R. 4422, 80th Cong., 1st Sess. (Mundt bill); H.R. 5852, 80th Cong., 2d Sess. (Mundt-Nixon bill); H.R. 3342, 81st Cong., 1st Sess. (Nixon bill); S. 1194 and S. 1196, reported out as S. 2311, 81st Cong., 1st Sess. (Mundt-Ferguson-Johnston bill); S. 4037, 81st Cong., 2d Sess. (McCarran bill); H.R.

The legislative history of the Act discloses the following:

(1) The sponsors of the legislation were bent on outlawing the Communist Party by requiring it to register as a foreign agent. The first ancestor of the Act, the Mundt bill (H.R. 4422, 80th Cong., 1st Sess.), would have required the Communist Party by name to register as a foreign agent without judicial or quasi-judicial determination of the facts.[10] However, the Congress was informed by Attorney General Clark and various constitutional authorities, testifying before the legislative sub-committee of the House Committee on Un-American Activities, that this singling out of the Communist Party by name was probably unconstitutional as fiat legislation violating the due process and bill of attainder clauses. (House Hearings, pp. 19-20, 113, 115, 117, 209-11, 256, 432, 493-95.)

Because of these warnings, the Committee on Un-American Activities rejected the crude approach of the Mundt

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7595, 81st Cong., 2d Sess (Nixon bill). Applicable committee reports are: H. Rep. 3112, 81st Cong., 1st Sess. (Conference Report on H.R. 9490); H. Rep. 1844, 80th Cong., 2d Sess. (on H.R. 5852); Sen. Rep. 1358, 81st Cong., 1st Sess. (on S. 2311); H. Rep. 2980, 81st Cong., 2d Sess. (on H.R. 9490); Sen. Rep. 2369, 81st Cong., 2d Sess. (on S. 4037). Applicable hearings are: Before Subcommittee on Legislation of Committee on Un-American Activities, H.R., 80th Cong., 2d Sess., on H.R. 4422 and H.R. 4581 (Feb., 1948); Before Committee on Judiciary, Sen., 80th Cong., 2d Sess., on H.R. 5852 (May 1948); Before Committee on Judiciary, Sen., 81st Cong., 1st Sess., on S. 1196 (April-June, 1949); Before Committee on Un-American Activities, H.R., 81st Cong., 2d Sess., on H.R. 3903 and H.R. 7595 (March, 1950).

[10] Section 1 of the Mundt bill provided: "That notwithstanding the provisions of any other law any person who is a member of the Communist Party or of any organization, association, or other combination of individuals which is dominated, directed or controlled by the Communist Party, shall be required to register with the Department of Justice, Washington, District of Columbia, as an agent of a foreign principal." Mr. Mundt later proposed that his bill be amended, for purposes of administrative convenience, to require registration by the Party itself, rather than by the individual members. House Hearings, p. 4. The bill is quoted in these hearings at p. 2.

bill and reported the Mundt-Nixon bill (H.R. 5852, 80th Cong., 2d Sess.), which first proposed the scheme of an administrative proceeding to determine registerable organizations. Representative Nixon, chairman of the legislative sub-committee of the Un-American Activities Committee and co-author of the bill, explained to the Senate Judiciary Committee the reason for the change (emphasis added):

> "We felt also that the Mundt bill, in its original form, was not the proper approach to the problem for two reasons. In the first place, the bill specifically named the Communist Party of the United States and attempted to build its definitions around the name of the party. From having heard the witnesses before our committee, we came to the conclusion that naming the Communist Party by name and attempting to build the entire registration provisions around such a definition was an unconstitutional approach and *consequently the committee attempted to find a legislative device for meeting the problem in a constitutional manner.* . . .
>
> "Our committee realizes that it would be a very dangerous thing to bring to the Congress and to the Senate a measure which went too far and which ran a great risk of being held unconstitutional by the Supreme Court because we realize that the Communists would make great capital of such a holding. For that reason alone our committee was particularly careful to attempt to find a constitutional answer to this problem. That is the reason that we do not name the Communist Party." [11]

The House and Senate Committees also informed the Congress in their reports on the bill which became the Act:

> "To make membership in a specifically designated existing organization illegal *per se* would run the risk of being held unconstitutional on the ground that such an action was legislative fiat." (H. Rep. No. 2980, 81st Cong., 2d Sess., on H.R. 9490, p. 5; Sen. Rep. No. 1358, 81st Cong., 1st Sess., on S. 2311, p. 9.)

[11] Hearings before Senate Committee on the Judiciary, 80th Cong., 2d Sess., on H.R. 5852, pp. 40, 45-46 (hereafter cited as Senate Hearings).

Accordingly, constitutional doubts alone prevented the authors of the Act from identifying the Communist Party by name, and led them, in Mr. Nixon's words, to attempt "to find a legislative device for meeting the problem in a constitutional manner."

The legislative history of the Act reveals the nature of "the problem" with which the authors of the Act were confronted. It shows that Congress knew that the Communist Party could not fairly be proved to be engaged in a seditious conspiracy or controlled by a foreign power. The "problem," therefore, was how to order it to register as such an organization without proof of guilt and without specifically naming it. The Act is the "legislative device" to solve this "problem."

The problem was first disclosed to the Congress by Attorney General Clark. In the same testimony in which he cast doubt on the validity of legislation which would specifically name the petitioner, the Attorney General advised that there already existed laws which required registration of foreign agents and punished advocacy of violence, but that they could not be employed against the Communist Party or its membership because the government could not prove a case under them. Justifying the failure to use such existing legislation against the Communist Party or its members, Mr. Clark explained:

(a) As to the failure to use the Smith Act, which prohibits advocacy of the overthrow of the government by force and membership in a group which so advocates:

> "By means of this statute, we are able to prosecute, provided we are able to obtain proof of force or violence. . . . Adequate proof against the individual in this regard is most difficult to adduce. In fact, the dignitaries of the American Communist Party have each denied that they have any aim or purpose to overthrow the Government by force or violence. Because of the shifting program and the character of the Party line, which can adjust itself to suit almost any limita-

tion, we have found it more practical, effective, and much more speedy to proceed under other Federal statutes." (House Hearings, p. 21).

(b) As to the failure to prosecute the Communist Party for not registering under the Voorhis Act, which requires registration of organizations subject to foreign control or having the purpose of overthrowing the United States government by force;

"In order to force a registration or to prosecute any organization for failing to register under the act, we must prove in one or more of the combinations described in the act that the purpose or aim or one of the purposes or aims of the organization is to overthrow by force or violence the Government of the United States, or that the organization is engaged in civilian military activity prohibited by the statute or is subject to foreign control.

"The fact is that the description of activities which make it obligatory for an organization to register is enough to brand the organization as subversive. As soon as the Voorhis Act was passed, . . . the Communist Party changed its constitution for the purpose of disaffiliating, as the announcement put it at the time, from the Communist International in order to avoid registering under what the party called the Voorhis Blacklist act. . . .

"You have asked me what, in my opinion, is the true character and aim of the Communist Party in the United States, Mr. Chairman. The ultimate question, however, is not what my opinion may be, but what proof exists to successfully prosecute an individual or organization under the above statutes. Although the Voorhis Act has been on the books since 1940, no Attorney General has directed a prosecution under it." (*Ibid.*)

(c) As to failure to prosecute the Communist Party or its members for not registering under the Foreign Agents Registration Act, as amended:

"By the provisions of this act, agents of foreign principals are required to file a registration statement

with the Attorney General and to label political propaganda disseminated by them. The terms of the act are sufficiently broad to require registration by members of the Communist Party; provided, of course, that proof is available that they are operating in this country as agents of a foreign principal. This is a difficult task. . . ." (*Id.*, pp. 21-22).

The sponsors of the legislation, accepting the Attorney General's testimony, informed Congress that the Act was necessary because the Communist Party could not be proved, by accepted legal standards, to be a seditious foreign agent. The Senate Committee stated that the Act was required by the "inadequacy" of existing legislation. It explained:

> "Congress has passed several laws which were directed specifically at curbing the subversive activities of communism in the United States, but they have proved largely ineffectual in accomplishing their purpose. As has been cited above, the Attorney General on February 5, 1948, testified before a committee of Congress that present laws were inadequate to deal with the subversive activities of the Communist threat in the United States.[12] There have been no significant additions to statutory law in this field since that date." (Sen. Rep. No. 1358, *supra*, p. 7).[13]

The House Committee Reports contain passages to the same effect as to the "inadequacy of existing legislation" (H. Rep. No. 2980, *supra*, p. 2; H. Rep. No. 1844, *supra*, p. 5), and Mr. Nixon made a similar explanation when testifying before the Senate Committee (Senate Hearings, *supra*, pp. 41-43).

In summary, therefore, the legislative history discloses the following:

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[12] The reference is to the testimony of Mr. Clark which we have just reviewed.

[13] The Report goes on to explain the "inadequacy" of each of the "present laws" along the lines of Attorney General Clark's testimony.

(1) The sponsors of the legislation were bent on outlawing the Communist Party (and subsequently other organizations) by requiring it to register as a seditious foreign agent.

(2) There already existed legislation requiring foreign agents and seditious organizations to register, as well as punishing seditious activity and advocacy. But this legislation could not serve the purpose because it required proof of violation, and such proof was not available against the Communist Party.

(3) On the other hand, the Communist Party could not be legislatively required by name to register as a seditious foreign agent, for all authorities agreed that this would be unconstitutional.

The Act represents the sponsors' attempt to resolve this dilemma. In order to avoid its first horn—the invalidity of a legislative verdict of guilt against petitioner by name—the Act provides that the name of the guilty party shall be determined administratively. In order to avoid the second horn of the dilemma—the absence of proof of guilt—the Act rigs the administrative procedure to insure that the petitioner will be ordered to register regardless of the evidence. This it accomplishes by three devices: (1) The Act predetermines the case by itself making the findings of fact prerequisite to entry of a registration order against petitioner. (2) The Act sets up standards of proof for the administrative adjudication which are so vague and irrelevant to the ultimate issue as to permit the administrative agency to execute the legislative verdict by making a determination of guilt without proof of guilt. (3) The Act creates as the adjudicative body a Board which is necessarily biased and prejudiced against the petitioner and which has an interest in deciding against it.

2. The Device of Legislative Predetermination of the Facts Essential to Guilt.

(1) Under the Act, certain facts essential to guilt have been found legislatively and as a matter of law are removed from administrative adjudication by the Board. These are the "facts" as to the existence and nature of the world Communist movement.

Section 3(3) defines Communist-action organization as an organization which is substantially controlled by the foreign power or organization "controlling the world Communist movement referred to in section 2" and which operates primarily to advance the objectives of the "world Communist movement as referred to in section 2." Accordingly, there can be a Communist-action organization in the United States only if there is a world Communist movement of the character described in section 2. However, the existence and nature of the world Communist movement are not issues left to adjudication by the Board. Instead, these "facts" are found by Congress in section 2.[14] The findings are then incorporated into section 3(3) in the form of assumptions of fact which the Board is not authorized to re-examine, but is required to accept as the foundation for its decision.

The correctness of these legislative findings regarding the world Communist movement is also assumed by the

[14] Section 2 represents the world Communist movement as "A world-wide revolutionary movement," controlled by the "Communist dictatorship" of a foreign country. It asserts that the purpose of this movement "is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization." Section 2 further finds that the foreign Communist dictatorship establishes and utilizes Communist-action organizations in various countries which "promote the objectives of such movement by conspiratorial and coercive tactics" and "by bringing about the overthrow of existing governments by any available means, including force, if necessary."

eight criteria which section 13(e) requires the Board to apply in deciding whether an accused organization is a Communist action organization. Seven of the eight criteria require the Board to act on the assumption that a world Communist movement exists and has the characteristics found in section 2.[15]

Accordingly, under the Act the Board is not free to decide that there is no world Communist movement, or that if there is one it is not controlled by a foreign government or does not have the sinister objectives and methods attributed to it by section 2. The Act does not contemplate Board determination of these issues. Moreover, the Board could not decide them in the negative without overruling the Congressional findings which are part of the definition and violating the standards which the Act requires it to apply.

The court below and the Board agreed with us that the section 2 findings on the existence and nature of the world Communist movement are binding upon the Board and the courts, and that these matters were not subjects for adjudication (R. 2132-33; Resp. Br. below, pp. 61-63).

(2) In addition, section 2 legislatively makes findings on the existence and identity of a domestic Communist-action organization. Since these are on the same issues which are ostensibly to be determined by the Board, the Act thereby predetermines the Board's decision.

In the first place, section 2 finds that there is an organization in the United States which is a Communist-action

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[15] Thus the first of the evidentiary standards of 13(e) is "the extent to which" an accused organization's policies are formulated and its activities performed pursuant to directives or to effectuate the policies "of the foreign government or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement, referred to in section 2." All the remaining standards, except 13(e)(7), refer back to "such foreign government or foreign organization" or "such world Communist movement."

organization. Sections 2(5) and 2(6) find that the foreign Communist dictatorship establishes and utilizes Communist-action organizations in various countries. Section 2(12) finds that there is a foreign-controlled "Communist network in the United States." Section 2(15) finds that "the Communist movement in the United States" is an organization, and that "*the* Communist organization in the United States" (emphasis added) endangers the security of the United States.

In addition, section 2 finds that "the Communist organization in the United States" has the major characteristics which, when supposedly found to exist by the Board, determine the Board's decision. Section 2(6) predetermines the Board's finding under section 13(e)(1) that the Communist organization in the United States operates under the direction of the foreign Communist power and to effectuate its policies. Section 2(5) predetermines the Board's finding under 13(e)(6) that members of the domestic Communist organization are under foreign discipline. Section 2(7) predetermines the Board's finding under 13(e)(7) that the domestic Communist organization utilizes secret practices to promote its objectives and conceal its true character. And section 2(9) predetermines the Board's finding under 13(e)(8) that members of the domestic organization have transferred their allegiance from the United States to the foreign power.

By legislative fiat, section 2 thus predetermines virtually all of the elements requisite for the entry of a registration order, including the supposed existence, nature, objectives and foreign control of a world Communist movement, and the existence, purposes and characteristics of an organization which it finds to be the domestic agent of that movement. Unlike the predetermination with regard to a world Communist movement, the findings as to the claimed domestic agent of the movement are not expressly incorporated into the definition and the evidentiary standards, so that the latter issues are ostensibly open for administrative

determination. But this difference is not significant. For it would be fatuous to expect the Board to overrule legislative findings on the identical issues it is supposed to determine. This is particularly true because these findings furnish the justification for the enactment of the legislation and the establishment of the Board. Moreover, they are prefaced by Congress' assertion that they were made "As a result of evidence adduced before various committees of the Senate and House of Representatives."

(3) Congress, then, found that there *is* a Communist organization in the United States, that it *is* the agent and operates to carry out the seditious objectives of a destructive world Communist movement, which *is* controlled by a foreign power. Obviously, therefore, Congress left only one thing for the Board to find. The Board's sole function was to supply the name of the particular organization which Congress had in mind when it referred in section 2(15) to "the Communist organization in the United States."

As to this there can be no earthly doubt. Petitioner denies the truth of the findings of section 2. But it is beyond question that by these findings Congress referred to, and meant, the Communist Party of the United States, the petitioner here. Indeed, as we have seen, only qualms as to constitutionality kept Congress from identifying the petitioner by name. The evidence adduced before various committees of Congress, on which the findings purport to rest, dealt with the petitioner by name; the legislation was recommended as a weapon against the petitioner by name; and the reports and debates dealt with the petitioner by name. Moreover, section 2(15) of the Act refers to a *single* "Communist organization in the United States," and if the petitioner is not the organization meant by Congress, it is obvious that there is none which can possibly be identified as such.

If after all this there could remain any lingering doubt that Congress intended to and did identify the petitioner

as the Communist-action organization in the United States, two further circumstances would dispel it. Section 2(15), in describing "the Communist organization in the United States," contains verbatim excerpts from Judge Hand's description of the petitioner in *United States* v. *Dennis*, 183 F. 2d 201, 212, 213. And the House and Senate reports accompanying the legislation advised Congress, in identical language, that the petitioner is a Communist-action organization within the meaning of the section 3(3) definition. The reports stated:

> "There is incontrovertible evidence of the fact that the Communist Party of the United States is dominated by such totalitarian dictatorship and that it is one of the principal instrumentalities used by the world Communist movement in its ruthless and timeless endeavor to advance the world march of Communism." [16]

This Court flatly ruled in *Carlson* v. *Landon*, 342 U. S. 524, 535, 544, that section 2(15) of the Act in mentioning "the Communist movement in the United States" refers to the petitioner herein.

Accordingly, even the particularized identification of the petitioner as the organization against which the first registration order should be issued was likewise legislatively predetermined. The Board could not have found that petitioner was not the domestic Communist organization referred to in section 2 without overruling Congress.

Nothing is clearer than that the Act is fiat legislation as much as Representative Mundt's original proposal which would have required the Communist Party by name to register as a foreign agent.[17]

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[16] House Rep. No. 2980, *supra*, pp. 1-2; Sen. Rep. No. 1358, *supra*, p. 5. The same passage appears in the House Committee Report on the Mundt-Nixon bill. House Rep. No. 1844, *supra*, p. 3.

[17] While this case was pending in the court below, Congress adopted the naked fiat of the Mundt bill by enacting section 4 of the Communist Control Act, which declares the petitioner by name to be a Communist-action organization.

3. The Device of Irrational and Vague Standards.

Section 13(e) is the second device employed by the Act to guarantee that a registration order would be issued against petitioner without the necessity for proof that it is a Communist-action organization. That section directs the Board to take eight criteria into consideration in making its determination. These, singly and collectively, have no reasonable relation to the ultimate facts to be established. Instead, they furnish irrelevant and vague standards which permit the Board to give a spurious rationalization to the legislative finding against petitioner.

(a) By the section 3(3) definition, a Communist-action organization is distinguished by two characteristics: (1) foreign control, and (2) advancement of the objectives attributed by section 2 to the world Communist movement, all of which are seditious. However, none of the criteria of section 13(e) (which were the only criteria applied by the Board) has any relevance whatsoever to the advancement of seditious objectives, and still less to those attributed by section 2 to the world Communist movement. Only three of the eight standards of 13(e) ("directives and policies," "non-deviation," and "secret practices") have anything to do with objectives, and none of these requires proof that the objectives referred to are those attributed to the world Communist movement or are seditious.

The court below (R. 2118, 2121, 2122), and the Board in its brief below (p. 72), agreed that the standards of section 13(e) have no relevance to the issue of whether an accused organization operates to advance the evil objectives described in section 2.[18]

Accordingly, section 13(e) admittedly authorized the Board to find that petitioner advances the seditions objectives described in section 2, without proof of that fact.

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[18] The Board stated (Br. 72): "Whether the individual foreign controlled policies are good or evil is irrelevant."

(b) As to foreign control, which is the first component of the section 3(3) definition, the situation is hardly better. On that issue, the tests supplied by 13(e) are nebulous, circumstantial, and largely irrelevant. This becomes plain when each is examined.

"Directives and policies." Section 13(e)(1) directs the Board to consider "the extent to which" the accused organization formulates and carries out its policies or performs its activities "pursuant to directives or to effectuate the policies" of the foreign government which directs and controls the world Communist movement described in section 2.

At first blush this seems to be merely a more involved statement of the 3(3) definition. But, as we have already seen, it is acknowledged that neither this nor the other tests are relevant to the second component of the definition, and in fact this standard does not require proof of the seditious objectives described in section 2.[19] Furthermore, section 3(3) states the two elements of a Communist-action organization in the conjunctive. Section 13(e)(1), however, refers to the elements of foreign control and objectives in the disjunctive. Accordingly, it authorizes the Board to infer foreign control from the fact that the alleged agent advances objectives which are not peculiar to the alleged principal, but which may be shared by, and may benefit, non-Communist individuals and governments, including our own. This is plainly irrational. Yet it is just what the Board did under this section (see *infra*, pp. 133-37).

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[19] Section 3(3) defines a Communist-action organization as one which operates to advance the seditious objectives ascribed to the world Communist movement and the Soviet Union by section 2. Section 13(e)(1), however, does not require the Board to consider whether the organization seeks to effectuate the alleged seditious Soviet objectives. Instead, it directs the Board to consider only whether the accused organization seeks to effectuate any policies of the Soviet Union, irrespective of their content.

"Non-deviation." Section 13(e)(2) directs the Board to consider "the extent to which" the accused organization's views and policies "do not deviate from those of" the Soviet Union. The section does not confine the inquiry to Soviet views and policies on particular matters. Accordingly, evidence of non-deviation with respect to any of the countless subjects on which the Soviet Union has expressed a view becomes proof of foreign domination and control and of a purpose to advance the seditious objectives ascribed to the world Communist movement by section 2.

This test is irrational in several respects.

(1) It permits the advancement of the seditious objectives described in section 2 to be established by proof of "non-deviation" from views and policies which are either unrelated to the national interest or are in fact calculated to promote the welfare of the United States and its people. The court below acknowledged that this standard has no relevancy to the objectives element of the section 3(3) definition, asserting that "the point" of the test is "foreign domination" (R. 2122).

(2) Identity of views cannot be a rational criterion of Soviet control if the views involved are not peculiarly characteristic of the Soviet Union, if they are widely held by non-Communists, if they are demonstrably true, or if they are independently arrived at. Yet the standard ignores these factors. Under this obscurantist test, the stigma of foreign control and sedition can be avoided only by adopting views which are demonstrably false if the Soviet Union has adopted views which are demonstrably true. In the area where views may reasonably differ, the stigma can be avoided only by mechanically opposing any position taken by the Soviet Union, regardless of its merits, thus subjecting oneself to Soviet control in reverse.[20]

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[20] As we later point out (*infra*, pp. 140-44), the Board applied all the irrational features of the non-deviation test, predicating guilt on views which concededly may be in the national interest, demonstrably true, widely held, and independently arrived at.

"*Financial Aid.*" Section 13(e)(3) directs the Board to consider "the extent to which" an accused organization "receives financial or other aid, directly or indirectly, from or at the direction of the foreign government or organization that directs, dominates and controls the world Communist movement described in section 2."

It is obvious that a contribution to a cause which the contributor deems worthy of support does not thereby subject the recipient to the "direction, domination or control" of the contributor. Nor does it make the recipient the agent of the contributor "to advance the objectives" of the latter, let alone to advance specific seditious objectives. History and experience provide many examples of aid by governmental and non-governmental bodies to organizations which they do not "dominate or control" and which operate to promote their own objectives, not those of the donor. Similarly, it is well known that bad people contribute to good causes, and vice versa.

This is not, of course, to deny the obvious truth that the giving or withholding of financial assistance may be a lever by which the contributor secures and exercises control of the recipient and shapes the latter's policies to conform with its own. In that case, the relevant consideration is not the bare fact of aid, but the terms and conditions, if any, on which it is given. But, as the court below acknowledged (R. 2123), section 13(e)(3) does not direct the Board to consider the relevant factor of terms and conditions, but focuses exclusively on the irrelevant factor of aid.[21]

"*Instruction and Training.*" Section 13(e)(4) directs the Board to consider "the extent to which" an accused organization "sends members or representatives to any foreign

[21] By the logic of section 13(e)(3), the foreign aid programs of the United States are proof of the charge that it "dominates and controls" other governments. Those who make this charge (which our government denies) do not base it on the irrelevant factor of financial aid, but on the terms and conditions attached to the aid.

country for instruction or training in the principles, policies, strategy or tactics" of the world Communist movement, as described in section 2.

This test is irrational because it does not require a showing that the accused organization is obliged to or does conform to what is taught.

"Reporting." Section 13(e)(5) directs the board to consider "the extent to which" an accused organization "reports to" the Soviet Union or the foreign organization which assertedly controls the world Communist movement. This test is irrational because it makes "reporting" proof of foreign control without regard to the nature and content of the "report," the purpose for which it was given, or its use, if any, by the recipient. Labor, business, religious, scientific, cultural and political organizations customarily receive reports at their gatherings as a means of exchanging and sharing knowledge, experiences, and ideas. Under the preposterous theory of this subsection, those who report at such gatherings furnish evidence that they are "dominated and controlled" by the sponsoring organization.

"Discipline." Section 13(e)(6) directs the Board to consider "the extent to which" the organization's "principal leaders or a substantial number of its members are subject to or recognize the disciplinary power" of the alleged foreign principal. This standard permits the condemnation of the organization upon proof of the disciplinary status or subjective attitude of some of its leaders or members, notwithstanding that they may be an unrepresentative or dissenting minority and that the organization itself is completely independent.[22]

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[22] In condemning a similar clause in the Mundt-Nixon bill, the antedecedent of the act, Mr. John W. Davis wrote the Senate Judiciary Committee in response to its request for his comments: "But assume, if you will that the organization contains some members or even some 'leaders' who * * * recognize the disciplinary power of such foreign government * * * how many or what proportion of such

"Secret Practices." Section 13(e)(7) directs the Board to consider "the extent to which" the accused organization conceals the identity of its members and the contents of its records, and otherwise operates on a secret basis "for the purpose of concealing foreign direction, domination or control, or of expediting or promoting its objectives."

This test is incapable of rational application. It makes "secret practices" relevant only if employed for the purpose of concealing foreign control or promoting the organization's objectives. The first of these purpose limitations involves circular reasoning, since foreign control is one of the ultimate facts to be established under section 3(3). Obviously, a standard whose application requires proof of an ultimate fact cannot be used to determine the existence of the ultimate fact. As to the second purpose limitation, if the reference is to promotion of the objectives attributed to the world Communist movement by section 2, then the same circuity exists. If, on the other hand, "objectives" embraces all possible organizational purposes, then the secrecy test has no rational relation to the ultimate fact to be proved.

"Allegiance." Section 13(e)(8) directs the Board to consider "the extent to which" the accused organization's "principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations" to the Soviet Union or the foreign organization which allegedly controls the world Communist movement.

The "allegiance" test is completely subjective. It directs an inquiry into a pure state of mind. Moreover, the section assumes the facts prerequisite to the state of mind into which the Board is to inquire. It does not direct the

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individuals are to be held sufficient to color the entire organization? What is to be the status of a dissenting member, a minority of members or even a majority who do not hold such views? Are they and the organization to be condemned on the principle of *noscitur a sociis*, i.e., guilt by association?" Senate Hearings, *supra*, p. 421.

Board to determine whether any of the organization's leaders or members owe obligations to the Soviet Union or a foreign organization. It assumes that they do owe such obligations and confines the Board's inquiry to the question whether the leader or members "consider" these obligations subordinate to their allegiance to the United States. Furthermore, this section, like that on "discipline," imputes to the organization the state of mind of its "principal leaders or a substantial number of its members" although they may be an unrepresentative or dissenting minority and though the organization itself is completely loyal.

(c) The standards of section 13(e) are vague, as well as irrational. The Act nowhere indicates whether a registration order must be supported by adverse findings under all eight standards, or whether something less is sufficient. In this connection it is significant that the Mundt-Nixon bill, which was the antecedent of the Act, directed the Board to consider "some or all" of the evidentiary standards which it contained. The vagueness of this language was criticized as unconstitutional by Mr. Charles Evans Hughes, Jr., who was invited by the Senate Judiciary Committee to comment on the pending measure (Senate Hearings, *supra*, p. 417). Mr. Seth Richardson, who later served as the first Chairman of the Board, commented in response to the Committee's invitation that this language "leaves the measure of the envelopment of the particular organization in any of the activities noted, to depend largely on the particular cast of mind of whatever person the bill proposes shall reach the conclusion" (*id.*, p. 445). It was apparently to avoid these criticisms that the words "some or all" were omitted from the bill as enacted. Clearly, however, this omission does not cure the defect, but only adds ambiguity to uncertainty.

The obscurity which thus envelops section 13(e) is made even more impenetrable by the phrase "the extent to which,"

which prefaces each of the eight standards. In commenting on this phrase, which appeared in the original Mundt-Nixon bill, Mr. John W. Davis stated: "Or take the introductory phrase itself as used throughout—'the extent to which, etc.'—what are the limits which these words envisage? To how great an extent, how customary a practice, how definite, pervasive, or continuous a policy? There would seem to be no room here for the application of any doctrine of *de minimis*." Mr. Davis concluded that the vagueness and uncertainty of the standards of the Mundt-Nixon Bill vitiated the entire bill. (*Id.*, pp. 420-22.)

The foregoing examination of section 13(e) shows that it perverts the function of the orthodox legislative enumeration of factors to be taken into account by an administrative agency in reaching its determination. The legitimate role of such an enumeration is to give definite content to a generalized ultimate standard.[23] In the Act, however, the ultimate standards established by section 3(9) are definite and meaningful, so that no implementation by subsidiary criteria or guides is required. The sole function of the irrational and vague standards of 13(e) is to authorize petitioner's conviction of one thing on proof of another.

4. The Device of a Biased Tribunal.

In addition to predetermining the essential findings and establishing vague and irrational standards of proof, the Act establishes a Board which is necessarily under compelling pressure to decide against petitioner and whose members have a personal stake, financial and otherwise, in so deciding.

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[23] For examples of legislation in which legislative guides were employed to give more definite content to generalized ultimate standards, see the statutes involved in *Yakus* v. *United States*, 321 U. S. 414; *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U. S. 126; *Hampton, Jr. & Co.* v. *United States*, 276 U. S. 394; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381.

The Board is set up as a permanent agency, which originally had the sole function of identifying Communist-action organizations, their members, and Communist-front organizations. Since Communist-front organizations are by definition tools of a Communist-action organization, they can exist only if the Board finds that there is an action organization.[24]

The Act and its legislative history contemplate the existence in the United States of only one Communist-action organization, the petitioner (see *supra*, p. 44). And even if Congress had considered that there might be more than one, it is certain that it believed petitioner to be the principal organization of that character.

It is clear, therefore, that if the Board had decided that the petitioner was not a Communist-action organization, it would have prevented the Act from being applied to any organization at all. For there would be no other organization which could be charged with being a Communist-action organization and there could be no Communist-front organization.

This fact has been recognized by the Attorney General and the Board itself. Although the case against the petitioner was pending before the Board for over two years, the Attorney General instituted no proceeding during that time against any other organization. Yet only two days after the Board issued its decision against the petitioner, the Attorney General filed twelve petitions with the Board, all charging that the organizations named were Communist-front organizations controlled by the petitioner as a Communist-action organization. In the five years that the Act has been in existence, only one organization, the petitioner, has been charged before the Board with being a Communist-action organization.

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[24] After the registration order was issued, the Communist Control Act gave the Board the additional function of identifying Communist-infiltrated organizations. The definition of the latter also presupposes the existence of a Communist-action organization (sec. 3(4A)).

The first two chairmen of the Board both advised Congressional appropriation committees that the continued functioning of the Board depended entirely upon the entry of a registration order against petitioner. The first chairman of the Board advised the appropriations committee:

> "Now, of course, the fundamental agency that covers all of these 130 organizations [on the Attorney General's list of 'subversive organizations'] is the Communist Party because they are all splinter groups from the Communist Party, and if the Communist Party is not found to be subversive then this splinter group cannot be so found." [25]

The second chairman of the Board informed the committee (emphasis supplied):

> "The Attorney General advises that some 25 petitions will be filed with the Board during the balance of this fiscal year *in the event that the Board's final decision orders the Communist Party so to register.*" [26]

Thus it appears that the Board was told, in *ex parte* conversation with the only litigant empowered to initiate proceedings before it, that it would get additional business only if it decided for that litigant in the pending case against petitioner.

The following colloquy regarding the case against petitioner also occurred between a member of the appropriations sub-committee and the second chairman of the Board:

> "Mr. Cotton: The case is of paramount importance, upon which the whole structure rests, and without which there can be no structure.
>
> "Mr. Brown: Yes." [27]

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[25] Hearings before Subcommittee of Committee on Appropriations, H.R., 81st Cong., 2d Sess., on Second Supplemental Appropriations Bill for 1951, p. 263.

[26] Hearings on Independent Offices Appropriations for 1954 before Subcommittee of Committee on Appropriations, H.R., 83rd Cong., 1st Sess., p. 188 (Feb. 23, 1953), and see also at pp. 190, 196-198.

[27] Id., pp. 198-199. For testimony to the same effect given by Mr. Brown a year earlier, see Hearings on Independent Offices Appro-

The "structure," of course, was the Board and the Act.

As its chairmen recognized, the Board, therefore, could not have decided in favor of the petitioner without rendering itself *functus officio* and, in effect, repealing the Act. It is inconceivable that an administrative agency would have the temerity to frustrate the will of Congress by repealing the Act which created it. Accordingly, irresistible pressure was exerted on the agency to decide in the only way which would preserve the Act and the agency—that is, against the petitioner.

The pressure on the Board to preserve itself and the Act by deciding against petitioner was intensified by considerations of personal interest. The members of the Board had to rule against petitioner if they were to have any further business and thus keep their jobs, salaries, and the appointment patronage available to them as heads of an agency. The Board's staff, including those employees who assisted the Board in analyzing the record and preparing the decision, had a similar job interest in seeing that the order was adverse to petitioner.

II. The Act Violates the Due Process Prohibition Against Fiat Legislation

Since the order of the Board deprives petitioner and its members of liberty and property, it may not constitutionally be entered without a hearing. *Joint Anti Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *Morgan* v. *United States*, 304 U. S. 1. If any of the elements requisite to a determination of liability are found legislatively, rather than by means of the hearing, the due process clause has been violated. *Manley* v. *Georgia*, 279 U. S. 1; *Western and Atlantic Railroad* v. *Henderson*, 279

priations for 1953 before Subcommittee of Committee on Appropriations, H.R., 82d Cong., 2d Sess., pp. 245, 248 (Jan. 16, 1952).

U. S. 639; *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79; *Tot* v. *United States*, 319 U. S. 463.

The Act violates due process because in two respects it legislatively determines elements essential to the issuance of a registration order against petitioner.

(1) As we have seen, it is uncontroverted that there has been a legislative predetermination of the existence, objectives and nature of a world Communist movement, which is binding on the Board and the courts. The court below so decided, and the Board conceded this to be the case in its brief (*supra*, p. 42).

The court below held (R. 2132) that this legislative predetermination was not a violation of due process for the reason that:

> "The rule, as we understand it, is that, if it appears Congress has power over the subject matter of a statute, and if the findings of fact are not baseless but are based on extensive investigation, the courts are to adopt these findings."

It is apparent, however, that the court relied on an inapplicable "rule." The principle to which it referred is applicable only to "legislative" as distinguished from "adjudicative" facts. As the Board itself has pointed out, a distinction must be made between "the *legislative* facts which reasonably tend to establish a situation which Congress, on investigation, has found to require legislative action, and the *adjudicative* facts which, on proof in adversary litigation, bring a specific organization or person within the purview of the legislation enacted." Due process, as the Board recognized, requires that in the administrative proceeding an organization "be allowed to litigate . . . the operative facts which bring it under the coverage of the Act." Legislative facts, on the other hand, "are general conclusions which support the policy of a particular law, and can be attacked only by showing that Congress acted

arbitrarily or unreasonably, or beyond its delegated powers." [28]

The issue, therefore, is whether the existence, objectives and nature of the world Communist movement are legislative or adjudicative facts. Clearly they are the latter, since their existence is a prerequisite to bringing an organization under the coverage of the Act.

Petitioner has been ordered to register as a "Communist-action organization." The first component of the definition of such an organization is that it is the agent of the foreign government or foreign organization which controls "the world Communist movement referred to in section 2." The fact of such agency is obviously and concededly (R. 2118; Br. in Opp. to Cert., p. 15) an adjudicative or operative fact. Hence due process requires that petitioner be allowed to litigate the existence of this fact. But agency cannot exist without a principal. Therefore, due process requires that the petitioner be allowed to prove that there is no principal by showing that there is no world Communist movement as defined by section 2, and that consequently there is no foreign government or organization which controls that movement and can be the alleged principal.

The second half of the definition of a Communist-action organization is that it "operates primarily to advance the objectives of such world Communist movement as referred to in section 2". Due process requires that petitioner be allowed to litigate the adjudicative or operative fact of whether it operates to advance the described objectives. This means that petitioner must be allowed to prove that it does not so operate because (a) there is no such world Communist movement, and hence there can be no such objectives; or (b) if there is a world Communist movement, it does not have the objectives ascribed to it, and hence petitioner can not operate to advance them.

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[28] See Brief for Respondent in Opposition to Petition for Certiorari, pp. 13-16; Brief for Respondent in court below, p. 61-62.

Section 2, however, precludes petitioner from litigating any of the foregoing adjudicative facts. In short, petitioner has been ordered to register and label its publications and broadcasts as the agent of a foreign principal, without being allowed to prove the non-existence of this principal. It has been ordered to register (and label) as an organization which advances specified seditious objectives of a foreign movement, without being allowed to prove that the movement does not exist or does not have those objectives. Petitioner has, therefore, been foreclosed by legislative fiat from litigating adjudicative facts. This is a palpable violation of due process.

(2) As we have seen, the Act not only predetermines the "facts" concerning "the world Communist movement," but also finds the existence of a domestic organization having the characteristics of a Communist-action organization and identifies petitioner as that organization. It is true that findings as to these facts, unlike the findings as to the world Communist movement, are ostensibly left to administrative determination. But, as we have pointed out, the distinction is of no consequence (*supra*, pp. 43-44). Hence the Act violates due process by effectively removing from independent adjudication the identity of petitioner as a Communist-action organization.

The court below answered this contention on the grounds (R. 2116) that "Petitioner is not mentioned." But the fact that petitioner is not referred to by name in the text of the Act is an irrelevancy in the face of the facts that section 2 makes findings as to the existence and characteristics of a domestic Communist-action organization, that it unequivocally identifies petitioner as this organization, and that the name itself was supplied by the legislative history.

Moreover, section 4 of the Communist Control Act declares petitioner by name to be a Communist-action organization. The purpose and intended effect of that

section, enacted while this proceeding was pending below, was to influence the court below to affirm the Board's order. So far as petitioner and its members are concerned, section 4 has no other conceivable function. And the Congressional debates are replete with exhortations as to the necessity for judicial affirmance of the order of the Board. (See, e.g., 100 Cong. Rec., pp. 13849, 13945, 13956, daily pagination.) If courts are not susceptible to such pressure, section 4 has nevertheless effectively destroyed petitioner's constitutional right to judicial review of the administrative action. Inherent in that right is the assurance that in the event of a remand the petitioner can secure a fair administrative redetermination. If that were possible before the enactment of section 4 (and it was not), it is clearly impossible now.

Section 2 differs from a conventional legislative preamble in two vital respects. (1) Its findings concerning the world Communist movement are incorporated into the definition and the evidentiary standards of the Act as assumptions of fact which the Board is required to accept. (2) Other findings of section 2 which identify petitioner as the Communist-action organization in the United States are on the precise issues which are ostensibly to be adjudicated by the Board, so that the Board could not have decided in favor of petitioner without overruling Congress. The Act thus violates due process because it legally removes from administrative adjudication the operative facts concerning the world Communist movement and in fact removes from administrative adjudication the existence and identity of the organization within the Act's coverage.

III. The Act Is a Bill of Attainder

"A bill of attainder is a legislative Act which inflicts punishment without judicial trial." *Cummings* v. *Missouri*, 71 U. S. 277, 323. As stated in *United States* v. *Lovett*,

328 U. S. 303, 315, and repeated in *Garner* v. *Board of Public Works*, 341 U. S. 716, 722:

> "... legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial, are bills of attainder prohibited by the Constitution."

The Act, as we have seen, determines petitioner's guilt by legislative fiat and identifies petitioner and its members as the objects of statutory sanctions. But even if it is assumed, arguendo, that the Board was free to make an independent determination, still the Act denies petitioner a judicial trial and imposes sanctions on "easily ascertainable members of a group." For petitioner is accorded only an administrative hearing, not a judicial trial, and the Act imposes various sanctions on the organization identified by the registration order and on its members. Accordingly, if the registration order and the sanctions on organizations and their members "inflict punishment," the Act meets the definition of a bill of attainder and is invalid.

The distinction which must be made is between "regulation" of future conduct, which may constitutionally be imposed through the administrative process, and "punishment" of past conduct, the infliction of which requires a judicial trial. Clearly the Act does inflict punishment and does not regulate. The Act makes compliance with a registration order impossible (*supra*, pp. 28-33). Hence there can be no "regulation" through disclosure, and none was intended. The purpose of regulation is to confine an organization to non-deleterious conduct. But a registration order prevents the organization from engaging in any activity, however innocent and beneficial. It imposes a death sentence on the organization, and this is as obviously penal as execution of an individual.

The sanctions individually, as well as in their cumulative impact, are also penal. Compelling the organization pub-

licly to brand itself and its members by registering both as seditious conspirators has the punitive function of the pillory. The requirements for the invidious labelling of literature and broadcasts are punitive because their function is to stigmatize the organization and deny it an audience, regardless of the content of the material. Non-punitive regulation could be made only on the basis of content, as when obscene or lewd literature is barred. Cf. *Donaldson* v. *Read Magazine*, 333 U. S. 178, 191-192. Similarly, the limitation on financial contributions to the organization, regardless of their purpose and use, is punitive because its only effect is to injure, not to keep activities within proper bounds.

The Act deprives the organization's members of numerous privileges and subjects them to serious disabilities, regardless of their individual fitness to enjoy the privileges denied them. Since *Cummings*, it has been clear that the deprivation of privileges constitutes punishment if the grounds for deprivation have no reasonable relation to the fitness of persons to utilize or enjoy the privileges.[29] Under the Act, members of petitioner are conclusively determined to be unfit and ineligible to hold public office, a wide range of private employment, and passports. These disabilities are imposed solely because of association, without reference to the fitness of the individuals to enjoy these privileges if judged on their own merits as individuals, and even without regard to their lack of knowledge of the allegedly evil character of the organization. (See *infra*, pp. 72-75.)

The nature, number, and destructive impact of the sanctions on members, and their setting in the Act, demonstrate that they are punishment. They go far beyond the single, limited "loss of position" which *American Communications*

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[29] See *Cummings* v. *Missouri*, *supra*, at 320; *Garner* v. *Board of Public Works*, *supra*, at 722; *Dent* v. *West Virginia*, 129 U. S. 114; *Hawker* v. *New York*, 170 U. S. 189, 198; *United States* v. *Lovett*, *supra*.

Association v. *Douds*, 339 U. S. 382, 413, 414, held was intended merely "to forestall future dangerous acts."

A member of the organization can escape the disabilities by leaving it. But a forced deprivation of the privilege of association is itself punishment. As *Cummings* held (at 324): "These bills may inflict punishment absolutely, or may inflict it conditionally." *Douds* stated (at 413-14) that such an escape possibility is an indication that a sanction is not punishment. But this is contrary to *Cummings* and is logically and historically unsound. The possibility of escaping punishment by recantation does not negative the fact of punishment. If Congress were to place special disabilities on members of a particular religion the legislation would be invalid as a bill of attainder even though the members could avoid the disabilities by abandoning their church.

Moreover, if the members of an organization escape the Act's sanctions by leaving it, then by that fact alone the organization is destroyed. The organization has no escape from the registration death sentence which the Act visits against it. Hence the comment in *Douds*, even if correct, has no bearing on the attainder of the organization.

The Act has all the historical earmarks and practical effects of bills of attainder. They are characteristic of periods of savage political intolerance and hysteria. See Story's *Commentaries*, sec. 1344. They commonly represent a charge made by an angry and vindictive legislature of subverting the government or engaging in acts claimed to be prejudicial to the national security. See, e.g., bills attainting the Earl of Strafford, 3 How. St. Tr. 1382, 1518; Earl of Clarendon, 3 How. St. Tr. 318, 392; Bishop of Rochester, 16 How. St. Tr. 323; Archbishop Laud, 4 How. St. Tr. 598, 599. They are used where the evidence is insufficient to prove guilt or where the government is not satisfied with the severity of the punishment conventionally

imposed for an offense. Woodeson, *Law Lectures* (1792), 653 ff.; Miller, *Lectures on Constitution of the United States* (1893) 584. As we have seen, these are precisely the considerations which inspired the Act and determined its form.

IV. The Irrational and Vague Criteria of Section 13(e) Violate Due Process

1. Section 13(e) establishes rules of evidence which authorize the Board to infer that an organization is a Communist-action organization from the fact that it engages in one or more of eight practices. We have already seen that these practices are not relevant to the ultimate issues defined by section 3(3). The presumptions established by section 13(e) therefore violate due process.

Congress has the power to prescribe rules of evidence, including presumptions, in judicial or administrative proceedings. But that power is limited by the due process clause, which forbids the substitution of legislative fiat for proof. As stated in *Tot* v. *United States*, 319 U. S. 463, 467:

> "But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated . . . . Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience."

And as stated in *Manley* v. *Georgia*, 279 U. S. 1, 6:

> "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause."

Accordingly, the legislature may validly establish a presumption of fact only (1) if there is a rational connection between the fact to be proved and the ultimate fact to be presumed, and (2) if the presumption is not made conclusive of the rights of the person against whom it is raised. *Manley* v. *Georgia, supra; Adler* v. *Board of Education,* 342 U. S. 485, 496; *Tot* v. *United States, supra; Western & Atlantic Railroad* v. *Henderson,* 279 U. S. 639; *McFarland* v. *American Sugar Co.,* 241 U. S. 79; *Bailey* v. *Alabama,* 219 U. S. 219.

Section 13(e) violates both of the due process tests established by these decisions. First, as our analysis has shown, the presumptions created by section 13(e) are arbitrary and unreasonable (*supra,* pp. 46-52).

Second, the presumptions established by section 13(e) are not *prima facie,* as were those in the cited cases, but conclusive. The section does not permit the accused organization to show that the context in which the enumerated practices occurred negatives any rational inference that the organization is under foreign control or operates to effectuate the seditious objectives described in section 2. Nor does the section seem to permit the Board to "take into consideration" matters other than those enumerated. The Board's Report indicates that the Board considered the 13(e) criteria to exclude all matters not within their scope.

The court below attempted to meet our attack on section 13(e) by stating (R. 2120):

> "The statute says nothing about presumptions * * *. The section is a catalog of some basic considerations. There are no statutory presumptions."

Obviously, however, as the *Tot* line of cases makes perfectly plain, a statutory presumption is a grant of authority to infer an ultimate fact from proof of other facts. This is exactly what section 13(e) does.

The court below also held that any defect in the section 13(e) standards is not fatal because the "catalog in Section 13(e) is not exclusive" (R. 2119). That assertion, even if true, would not save the Act. The fact that the Act authorizes the Board to decide on the basis of irrational standards is enough to invalidate it.[30] As stated in *Bailey* v. *Alabama*, 219 U. S. 219, 235:

> "It is not sufficient to declare that the statute does not make it the *duty* of the jury to convict, where there is no other evidence but the breach of the contract and the failure to pay the debt. The point is that, in such case, the statute *authorizes* the jury to convict. It is not enough that the jury may not accept that evidence as alone sufficient; for the jury may accept it, and they have the express warrant of the statute to accept as a basis for their verdict. And it is in this light that the validity of the statute must be determined." (Emphasis in original.)

The fact is that the Act is invalid if any one of the standards of 13(e) is irrelevant to the ultimate issue. This appears not only from *Bailey* v. *Alabama*, but from the elementary logic that if any one of the propositions from which a conclusion is drawn is not valid, then the conclusion itself has not been demonstrated valid. Yet, as we have seen, the Board acknowledged below, and the court agreed, that while section 3(3) defines a Communist-action organization as one which promotes the seditious objectives attributed to the world Communist movement by section 2, section 13(e) authorizes the Board to issue a registration order without any proof whatsoever that the accused organization promotes these objectives. It is unnecessary to go beyond this single irrationality, the fact of which is not contested, to conclude that the Act is invalid.

The court below attempted to meet the contention that section 13(e) thus establishes an irrational system of proof, by stating (R. 2118-2119):

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[30] Furthermore, the Board rested its decision exclusively on the standards of 13(e). See *infra*, pp. 120-58.

> "The Party says that by the definition in Section 2 of the statute the world Communist movement engages in espionage, treason, etc., whereas none of the eight 'tests' to be applied to a domestic organization involves any of those offenses; and that thus the whole of Section 13(e) is irrational. The argument misconceives both the text and the purpose of the section. The inquiry with which the statute as a whole is concerned is in two separate parts: (a) What is the world Communist movement? That is dealt with in Section 2. (b). Is a certain domestic organization under the domination and control of that movement, and does it operate primarily to achieve its objectives? * * *. The so-called 'tests' in section 13(e) are directed at the latter problem alone. Thus construed, as it obviously was intended to be, the section is apt and cogent."

This passage begs the questions. If one of the issues of "the latter problem" is whether the domestic organization operates to achieve the objectives of the world Communist movement, all of which, as enumerated in section 2, are seditious and unlawful, that issue cannot rationally be resolved against the organization by proof that it operates to achieve only benign and lawful objectives.

The court below shifted its position when it discussed the "directives and policies" test of section 13(e)(1), stating (R. 2121):

> "The Party says that the 'directives and policies test' in Section 13(e)(1) is irrational. It says that the statutory definition of a Communist-action organization in Section 3(3) refers only to organizations which pursue objectives which are 'evil', whereas the test section refers to any objectives, good or bad.
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> * * * * * * *
>
> "The crucial factor in the statute before us is the aim, spelled out in detail, of the world Communist movement to disestablish our system of government. Our government may well oppose the establishment of a totalitarian dictatorship of the sort described in the definition, even if such a dictatorship does not meet the definition of 'evil' or even if it has many beneficent features."

But if "the crucial factor in the statute" is the alleged aim of the world Communist movement to disestablish our system of government, an accused organization cannot rationally be found to be a "Communist-action" organization in the absence of proof that it is engaged in promoting that aim. Yet no such proof is required by section 13(e) or by any other section.

Moreover, the "crucial factor in the statute" is not simply the aim of the postulated world Communist movement to disestablish our system of government, but to do so by violent and unlawful means (e.g., sec. 2(6), (15)). Indeed it is only the latter factor which can support the finding of section 2(15) that the American agent of the postulated world Communist movement presents "a clear and present danger to the security of the United States." Accordingly, an organization which operates to bring about a change in the existing social order in this country by peaceable and constitutional means cannot be a Communist-action organization. Yet none of the standards of section 13(e) requires proof that an organization operates to bring about social change through the use of violent or unconstitutional means. There is, therefore, no rational relation between the finding that an organization is a Communist-action organization and the evidence upon which the Act authorizes the Board to predicate the finding.

2. The internal vagueness of the tests of section 13(e) (*supra*, pp. 52-53) strips it of any ascertainable standard of judgment. In the words of the first chairman of the Board, section 13(e) commits the decision to "the particular cast of mind of whatever person the bill proposes shall reach the conclusion" (*supra*, p. 52).

Such an unfettered delegation of power violates due process and Article I, section 1 of the Constitution. *Burstyn* v. *Wilson*, 343 U. S. 495; *Winters* v. *New York*, 333 U. S. 507; *Niemotko* v. *Maryland*, 340 U. S. 268; *Kunz* v.

New York, 340 U. S. 290; *Musser v. Utah*, 333 U. S. 95; *Stromberg* v. *California*, 283 U. S. 359; *Herndon* v. *Lowry*, 301 U. S. 242; *Connally* v. *General Construction Company*, 269 U. S. 385; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *Small* v. *American Sugar Refining Co.*, 267 U. S. 233; *International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Champlin Refining Co.* v. *Commission*, 286 U. S. 210; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445; *Panama Refining Co.* v. *Ryan*, 293 U. S. 188; *Schechter Corp.* v. *United States*, 295 U. S. 495.

In the cited cases, criminal and regulatory statutes containing far more definite and ascertainable standards than section 13(e) were invalidated for their failure to measure up to this essential requirement of due process. The presence of narrowly drawn and definite standards is of special importance where, as here the conduct subject to regulation lies in the preferred area guarded by the First Amendment. *Burstyn* v. *Wilson; Winters* v. *New York; Niemotko* v. *Maryland; Kunz* v. *New York; Stromberg* v. *California; Herndon* v. *Lowry*, all *supra*.

In *Winters*, Mr. Justice Reed prophetically wrote (at 518):

> "The present case as to a vague statute abridging free speech involves the circulation of only vulgar magazines. The next may call for decision as to free expression of political views in the light of a statute intended to punish subversive activities."

This is the "next case" anticipated in *Winters*. If political expression is to be protected by the same due process standard that safeguards vulgar magazines, the Act must be condemned for failure to meet that standard.

V. The Act Violates Due Process by Establishing a Board Which Is Necessarily Biased and Has an Interest in the Event.

As we have shown (*supra*, pp. 53-56), the structure of the Act insured that the Board would be inevitably biased against petitioner. The Board could not have decided in favor of petitioner without rendering itself *functus officio* and, in effect, repealing the Act. Moreover, the Board members had a personal interest in ruling against petitioner in order to keep their jobs, salaries, and appointment patronage.

By establishing a tribunal which was subject to irresistible pressures to decide in one direction, and which necessarily had a personal interest in the outcome of the proceeding, the Act denied the petitioner a fair hearing and thus deprived it of due process of law. "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50. "Trial must be held before a tribunal not biased by interest in the event." *Fay* v. *New York*, 332 U. S. 261, 288. "Fairness of course requires an absence of bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U. S. 133, 136.

The fact that the Board members had a personal, financial stake—the keeping of their salaried jobs—in finding against the petitioner, as well as an official stake in preserving the Act and the Board, made the Board an incompetent tribunal. *Tumey* v. *Ohio*, 273 U. S. 510, flatly holds that it is a violation of due process to commit adjudication to one who has either a financial or official stake in the outcome of the case. The Court stated (at 532):

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law."

The jobs of the members of the Board staff, including those who assisted the Board in preparing the decision, were also staked on a decision adverse to the petitioner. The Board's reliance on such interested staff members in reaching its decision was at least as unfair as if it had utilized findings prepared by the active prosecutors for the government after an ex parte discussion which the petitioner had no opportunity to meet. Yet the latter procedure was held in *Morgan* v. *United States*, 304 U. S. 1, 22, to vitiate adjudication as "a vital defect."

In the *Fay* case *supra*, at 288, the Court recognized that a system of jury selection "could be so manipulated as to call a jury before which defendants would have so little chance of a decision on the evidence that it would constitute a denial of due process." The statute here so manipulates the character of the Board that petitioner had no chance at all of a decision on the evidence.

The Act embodies a much greater tampering with the administrative judgment than anything the Attorney General was alleged to have done in *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260. Congress not only listed the petitioner as an "unsavory" organization marked for registration, but also made the Board's tenure of office and the continued existence of the Act dependent on an administrative determination adverse to petitioner. Under these circumstances the denial of due process is patent.

VI. The Act Deprives Petitioner's Members of Liberty and Property Without Due Process of Law.

As we have seen (*supra*, pp. 29-32), a final registration order will result in intolerable sanctions on petitioner's members. The names of the members must be registered on an opprobrious list, either by the organization or themselves. The members are barred from virtually all employment, public and private. They are denied the right to travel abroad. Naturalized members may lose their citizenship.

The rights, privileges, and interest in reputation of which the members are deprived clearly constitute "liberty and property," protected by the due process clause.[31] Since the disabilities imposed on the members directly affect and injure petitioner, petitioner has standing to challenge their validity. For the test of standing is whether the action challenged substantially affects the interests of the complainant in a reasonably direct manner. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 152-154, 187.[32]

The Act deprives the organization's members of constitutionally protected rights and privileges solely because of

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[31] *Williams* v. *Fears*, 179 U. S. 270, 274; *Truax* v. *Raich*, 239 U. S. 33, 41; *Wieman* v. *Updegraff*, 344 U. S. 183; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *Schachtman* v. *Dulles*, App. D. C., No. 12,406, decided June 23, 1955. We recognize that *Galvan* v. *Press*, 347 U. S. 522, is decisive of the validity of the deportation and exclusion sanctions. Although the case seems to us to be wrongly decided, we do not press the argument as to those sanctions.

[32] And cf. *Pierce* v. *Society of Sisters*, 268 U. S. 510 (school permitted to challenge statute depriving pupils of due process); *Truax* v. *Raich*, 239 U. S. 33 (employee permitted to challenge statute depriving employer of due process); *Buchanan* v. *Warley*, 245 U. S. 60 (white grantor permitted to challenge statute depriving Negro grantee of due process); *Barrows* v. *Jackson*, 346 U. S. 249 (white grantor permitted to assert as defense constitutional right of Negro grantee).

the fact of membership. The Act thus represents an extreme case of imposing liability on individuals not for their misconduct, but solely because of their association.[33] It does so, moreover, without regard to the member's lack of knowledge of the claimed illicit purposes of the organization. Yet exclusion even from public employment cannot be imposed for organizational membership in the absence of such scienter on the part of the individual. *Wieman v. Updegraff*, 344 U. S. 183.

Furthermore, in *Adler* v. *Board of Education*, 342 U. S. 485, the Court unequivocally ruled that an individual could not be barred from teaching in the public schools even for knowing membership in a seditious organization unless he had an opportunity to prove that notwithstanding his membership he was fit to be a school teacher. The Court stated (at 495) that the statute involved was valid because the presumption of ineligibility arising from knowing membership "is not conclusive but arises only in a hearing where the person against whom it may arise has the full opportunity to rebut it." The Court added (at 496, emphasis supplied):

> "Where, as here, the relation between the fact found and the presumption is clear and direct *and is not conclusive*, the requirements of due process are satisfied."

Since the Act does not require scienter for the application of its sanctions against members, it is denounced by *Wieman*. Since, in addition, it makes conclusive a presumption of unfitness arising from membership, it is denounced by *Adler*.

The court below held that the scienter requirement of *Wieman* was satisfied on the grounds that (1) a member has knowledge of his membership; and (2), "The statute

[33] In this respect the Act also violates the First Amendment. See *infra*, pp. 100-05.

before us requires that before these sanctions apply a member must have 'knowledge or notice' that the organization has registered or been finally ordered to register" (R. 2103). These grounds are both irrelevant and inaccurate.

As *Wieman* makes abundantly clear, the scienter required by due process is personal knowledge that the organization has deleterious purposes. The requirement is not satisfied by knowledge of membership. Nor is it satisfied by knowledge or notice that the organization has been governmentally condemned. Moreover, in a case arising under the Act, knowledge that an organization has been found to have seditious or otherwise evil purposes cannot be inferred from knowledge that it has been ordered to register. For the court below held that a registration order may be issued without proof of such purposes (see *supra*, p. 46).

Furthermore, the court misread the statute in stating that knowledge or notice of a registration order is a prerequisite to the imposition of the sanctions. Under the Act, such notice[34] is necessary to support criminal prosecutions for applying for a forbidden job or a passport or for a member's failure to register himself if the organization failed to list him (secs. 5(a), 6(a), 8(b), 15(a)(2)). But this limited "scienter" is not necessary to the imposition of the civil sanctions and disabilities of the Act. For employers must deny a member employment and the government must withhold a passport from him, without reference to any kind of knowledge or notice on his part (secs. 6(b) and 5(a)(2)).

Finally, in view of the vague criteria of membership established by section 5 of the Communist Control Act, it is not true that "members" have knowledge of their membership. (See *infra*, pp. 75-82.)

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[34] Under section 14(k), notice of a registration order is given to members by publication in the Federal Register of the fact that the order has become final.

The sanctions which the Act imposes on the members also violate the due process principle that a regulatory law "shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained." See *Nebbia* v. *New York*, 291 U. S. 502, 525. As we later show (*infra*, pp. 100-05), the sanctions are arbitrary and do not have a real and substantial relation to any objective within the competence of the federal government.

VII. The Act Violates Due Process Because It Is Impossible Under Section 5 of the Communist Control Act to Determine Who Are Members of the Petitioner.

The Act makes it necessary for petitioner and its officers to determine who are members of petitioner. If the order of the Board becomes final, petitioner and its officers will be required to list the names of all the members in petitioner's registration statement (sec. 7(d)(4)). Other persons must determine whether they are members of petitioner in order to know whether they may lawfully hold certain jobs, apply for passports, or obtain naturalization. They must make the same determination in order to know whether they must register themselves upon the failure of the organization to file a registration statement listing their names.

Section 5 of the Communist Control Act (50 U.S.C. 844) sets forth criteria for determining membership in the Communist Party and makes the rule of evidence which it thus establishes applicable to all court proceedings where such membership is in issue. Accordingly, in preparing petitioner's registration statement, petitioner and its officers must apply the criteria of section 5 of the Communist Control Act if they are to avoid the criminal penalties of section 15 of the Act for failure to list a member or for making a false

listing. Other persons must similarly apply the section 5 criteria if they are not to incur the penalties of section 15 for engaging in conduct forbidden to members of Communist-action organizations and for failure to register themselves if petitioner does not list their names.

Section 5, however, prescribes such vague and irrational criteria that it is impossible for petitioner, its officers or others to determine the identity of petitioner's members. Moreover, the application of these criteria requires a knowledge of facts which petitioner and its officers cannot have or obtain. Section 5 thus unsettles and invalidates the Act as a whole, including the registration requirements.

Section 5 provides that "in determining membership or participation in the Communist Party or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented" as to 13 separate critera enumerated in the section. Even before examining the 13 criteria which follow, the introductory provision which we have quoted demonstrates that the entire section is invalid for two reasons.

In the first place, the quoted provision does not make the rule of evidence enunciated in section 5 applicable to prove membership in all organizations, but only in the Communist Party and in organizations which seek to effectuate the violent overthrow of the government. Obviously, there can be no rational basis for this classification.

Secondly, it appears from the introductory provision of section 5 that evidence as to one or more of the thirteen criteria of that section are admissible to prove indiscriminately (1) membership in petitioner, (2) "participation" in the petitioner, and (3) knowledge of the purpose or objective of the petitioner. Surely the identical criteria cannot rationally prove all three of these relationships, which involve entirely different concepts. Participation may exist without membership; knowledge of purpose may exist

without either membership or participation; and membership or participation may exist without knowledge of purpose. *A priori*, before examining the individual criteria, it is apparent that a system of proof which equates membership, participation and knowledge of purpose must either be wholly irrational or based on vague and indefinite evidentiary standards or both.

Turning to the thirteen criteria themselves, it should first be noted that none of them is limited as to time. Any conduct within one of the criteria serves as evidence of *present* membership irrespective of the fact that it occurred in the remote past. Such a rule of evidence is patently irrational.

Under paragraphs (5) and (7) of section 5, a court and jury may infer membership in petitioner from the fact that the individual in question has acted in *any* capacity "in behalf of" petitioner or "has been accepted to his knowledge * * * as one to be called upon for services" by petitioner's officers or members. Under these paragraphs the fact that a person supplies professional or business services to the petitioner or that his services are recommended by the petitioner or its members furnishes evidence that he is a "member" of petitioner. Under paragraph (2), a person who lends money to petitioner, regardless of the purpose and terms of the loan (including, for example, a mortgagee, or seller of goods on a running account) likewise furnishes such evidence.

Under paragraphs (6) and (11) membership may be inferred from the fact that the individual in question has "conferred with" officers or members of petitioner "in behalf of any plan or enterprise" of petitioner or "has advised, counseled or in any way imparted information, suggestions [or] recommendations" to any of petitioner's officers or members "in behalf of the objectives" of petitioner. As the Report of the Board acknowledges (R. 77), the petitioner is engaged in carrying out "plans" and "enterprises"

and in achieving "objectives" which are not only innocent but directed toward desirable social reforms, including the promotion of the trade union movement, the enactment of improved social security and welfare legislation, the elimination of discrimination against the Negro people, etc. Yet under paragraphs (6) and (11) any person who consults or advises with any officer or member of petitioner with reference to these praiseworthy "plans," "enterprises' or "objectives" thereby furnishes evidence that he is a member of petitioner.

Paragraphs (4), (9), (10), (11), (12), and (13) eliminate contact or communication between the individual in question and officers or members of the petitioner as a requisite to evidence of membership. Under these paragraphs, the holding of views similar to those expressed by Communists or even an attitude of receptivity to the views of Communists is made evidence of membership. These paragraphs permit a finding of membership from the fact that the individual in question:

1. Has executed plans of any kind of the petitioner (paragraph (4)).

2. Has prepared or circulated any written material "in behalf of the objectives and purposes" of petitioner (paragraphs (9) and (10)).

3. Has imparted information, suggestions, or recommendations to anyone "in behalf of the objectives" of the petitioner (paragraph (11)).

4. Has indicated in any way "a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes" of the petitioner (paragraph (12)).

5. Has "in any other way participated in the activities, planning, actions, objectives, or purposes of the organization" (paragraph (13)).

Under these paragraphs, anyone who has ever expressed a view or taken a position on any public question which is similar to the view or position taken by the petitioner, thereby furnishes evidence of his membership in petitioner. If he even so much as attends a public meeting called by petitioner or purchases a piece of its literature, he may be found, by that fact, to have indicated a willingness to carry out its plans, and hence to have supplied evidence of "membership." Indeed, since petitioner holds meetings with the purpose of attracting the public and publishes literature with the purpose of securing readers, attendance at a meeting or the purchase of literature ipso facto executes petitioner's "plan" to gain an audience.[35]

Under paragraph (8), a court and jury may consider as evidence of membership the fact that an individual has communicated in any way or form "orders, directives or plans" of the petitioner. A newspaper reporter who writes a story from one of petitioner's press releases, reports a speech by one of its officers, or purports to "expose" its plans thereby furnishes evidence of his "membership" in petitioner.

In short, under the criteria of section 5, almost anyone may be found to be a member of petitioner.[36] For this

[35] Commenting on section 5, the *Newark Ledger* stated, "Such a law might be used to herd into prison thousands of persons who have never been Communists and who have no basic sympathy with the Communist conspiracy." 100 Cong. Rec. p. 14399. The *Wall Street Journal* said, "One of these provisions is that it would be evidence of cooperation with the Communist groups if any person has indicated a willingness to carry out aims and purposes of the party. For all we know the Communist Party may be against juvenile delinquency. So is this newspaper." *Id.*, 14400.

[36] Counsel for petitioner apparently satisfy almost all of the thirteen criteria of membership merely by fulfilling their professional responsibilities in this case. In preparing our briefs and making our arguments, we have "executed * * * plans of any kind" of the petitioner, namely its plan to have the respondent's order set aside and thereby to survive (4th test). We have by our appearance before the Board and the courts "acted * * * in any * * * capacity in behalf

reason alone the officers of petitioner cannot possibly comply with the membership listing requirement. Moreover, they cannot even attempt to apply the criteria of section 5 because these involve considerations of the past and present conduct and state of mind of others which petitioner and its officers cannot conceivably know or ascertain. How, for example, is an officer to know all the individuals who ever "indicated * * * in any * * * way a willingness to carry out in any manner and to any degree the plans, designs, objectives or purposes" of petitioner (paragraph (12))?

If the order of the Board becomes final, petitioner and its officers can be punished by a $10,000 fine and five years' imprisonment for each member omitted from the registration statement (section 15(b) of the Act). But since they have no way of knowing whom to register, they are hope-

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of" petitioner (5th test). Naturally, we have "conferred with officers or other members" of our client, again "in behalf of" the "plan or enterprise" of getting the respondent's order set aside (6th test). By preparing our briefs, including this one, we have "prepared documents" in behalf of the petitioner's "objectives and purposes" (9th test). By delivering our briefs to the courts as well as by giving copies to other lawyers, we have "delivered to others material * * * of any kind in behalf of" the petitioner (10th test). We have "counseled" and otherwise "imparted information, suggestions, recommendations" about this case to officers of the petitioner and to the Court ("anyone else") in behalf of petitioner's objective to have the respondent's order set aside (11th test). We have, by accepting this case, "indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives or purposes of the" petitioner (12th test). By our participation in this case we have "in any * * * way participated in the activities, planning, actions, objectives, or purposes of the" petitioner (13th test). If our fee is too modest, it may be that we have made a "financial contribution * * * in any * * * form" (2d test). And because lawyers are obliged to accept instructions from clients, perhaps we have, by representing petitioner, made ourselves "subject to the discipline of the organization in any form whatsoever" (3d test). If our client is sufficiently impressed by our legal abilities to recommend our professional services to those of its members who need lawyers, we meet the seventh test.

lessly caught between the criminal penalties for each omission of a member and the penalties for a false listing.

Any person whom the petitioner might register as a member would immediately incur public infamy and the ruinous sanctions of the Act. True, he could request the Attorney General to remove his name from the registration list on the ground that he was not a member, and institute a proceeding before the Board for that purpose if the Attorney General failed for five months to act favorably (secs. 7(g) and 9(b)). However, it is difficult to conceive that the individual so listed could prove that he was not a member in the light of the criteria of section 5, and particularly in view of paragraph (1) of that section which makes the appearance of his name on petitioner's registration statement evidence of his membership.

The situation of such an individual is scarcely less difficult even if he convinces the Attorney General or the Board that he is not a member and therefore should have his name stricken from the list. For in view of the repeal of 5(c) and 6(c) of the original Act by 7(c) of the Communist Control Act, he will have incurred the employment and passport sanctions of the Act from the moment that the registration statement was filed until the time when his name is stricken from the list. The patient dies before the doctor arrives.

A person whose name is not registered by petitioner is in a dilemma. He cannot possibly determine from section 5 whether he will be found to be a member or not. He must therefore choose between the risk of prosecution for not registering, and the certainty of losing his livelihood and becoming a pariah by registering.

If such an individual decides not to register, he must of course take every precaution to avoid doing anything that can be used as evidence of membership. He must not express a view on any question until he has first ascertained petitioner's position. Thereafter, he must either give voice

to the contrary opinion or remain silent. He must abstain from association or communication with any person who is a member of petitioner. And since he has no way of determining who may be found to be a member, he must shun association or communication with all men. Prudence therefore dictates that he live the life of a hermit. But there is no safety for him even in that course. Since the criteria of section 5 are unlimited as to time, he may be dragged from his hermitage to be tried and convicted on the basis of some incident in his remote past.

Our description of the consequences of the membership criteria of section 5 is not the product of a lawyer's imagination run riot. Congressional Committees and Loyalty Boards have blasted the reputations and ruined the careers of hundreds of individuals and frightened thousands of others into silence by using precisely the same criteria to identify and expose "Communists." Indeed, the authors of the Communist Control Act merely borrowed this technique of McCarthyism, wrote it into law and implemented it with the intolerable sanctions of the Act.

The court below dismissed the Communist Control Act with the statement (R. 2125), "We think it has no application." As to section 5, at least, the statement is plainly erroneous. In the language of the opinion (R. 2082) the criteria of section 5 are clearly "attachments" of registration.

VIII. The Act Violates the Constitutional Privilege Against Self-Incrimination.

The registration of the organization must, of course, be accomplished by one or more individuals. The Act provides that the persons required to sign and file the registration forms for the organization shall be those specified in regulations to be issued by the Attorney General (secs. 7(d) and (h)). These regulations require the registration statement to be signed by the organization's principal offi-

cers and all the members of its governing board. 28 C. F. R. 11.205. If the organization does not register, or if its registration omits the names of any members, the members must register themselves (sec. 8). Failure of the officers to register the organization or of individual members to register themselves when and as required is punishable by astronomical penalties, which accumulate at the rate of five years imprisonment and $10,000 for each day that the failure continues (sec. 15).

The legislative scheme of the Act culminates, therefore, in an attempt to coerce confessions of membership in the Communist Party and participation in the alleged criminal conspiracy described in section 2 and punishable under section 4(a).

It is obvious, as the majority below acknowledged (R. 2096), that any person who signed petitioner's registration statement as an officer of the organization and gave the information required by section 7 would thereby admit his membership in the Communist Party and an "intimate knowledge of its workings." *Blau* v. *United States*, 340 U. S. 159, 161. He would necessarily, therefore, furnish "a link in the chain of evidence needed in a prosecution" (*ibid.*) of himself under section 4(a) of the Act, as well as under the Smith Act and a long series of other federal criminal statutes.[37]

The Court has held, however, that an admission of membership in the Communist Party, without more, is protected by the privilege against self-incrimination, *Blau* v. *United States*, *supra*; *Quinn* v. *United States*, 349 U. S. 155. The Act is thus a crude invasion of the Fifth Amendment privilege.

In an effort to avoid the patent unconstitutionality of compelling self-incrimination by the device of registration,

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[37] See *supra*, p. 34, ftn. 8. Registration also serves to identify the registrants for apprehension under the concentration camp provisions of Title II of the Act, 50 U.S.C. 811-26.

the Act contains a so-called "immunity" provision. Section 4(f) provides that the holding of office or membership in a Communist organization shall not, *per se*, constitute a violation of section 4(a) or any other criminal law, and that the fact of registration of any person under sections 7 and 8 shall not be admissible in a prosecution under section 4(a) or for any other crime.

While this provision tacitly recognizes the vulnerability of the Act,[38] it does not save it. The immunity which it confers does not comprehend all matters which the compelled admissions concern. The immunity of section 4(f) is therefore not coextensive with the constitutional privilege and does not affect it. *Counselman* v. *Hitchcock*, 142 U. S. 547; *United States* v. *Bryan*, 339 U. S. 323.

The majority below held that the privilege against self-incrimination is not available to petitioner's officers and, in any event, that its assertion at this time is premature. An analysis of the grounds for these conclusions demonstrates that they are erroneous and that Judge Bazelon's dissent, holding the Act unconstitutional, correctly states the law.

1. The majority below held (R. 2093-2094) on the authority of *United States* v. *White*, 322 U. S. 694, that petitioner's officers could not avail themselves of the privilege as a defense against a prosecution for failure to register. The *White* case, however, is inapplicable for two reasons.

In the first place, that case, and *Wilson* v. *United States*, 221 U. S. 361, which it followed, simply decided that the privilege is not available to the officers of a corporation or unincorporated association as a defense against a subpoena

[38] It is apparent from the debates on the Communist Control Act that Congress and the Attorney General recognized that the registration provisions of the Act are unconstitutional in the absence of an adequate immunity provision. See, e.g., 100 Cong. Rec. 13560, 13596, 14080, 13571-72, 13836, 13844, 13849, 13945, 14041, 14091-92 (daily pagination).

duces tecum ordering them to produce the records of the organization. In both cases, the Court emphasized that no question of an attempt to compel testimony from the officers was involved.[39] Likewise, in *Shapiro v. United States*, 335 U. S. 1, holding that the privilege does not protect individuals against the compelled production of "required records" and hence that such production does not confer immunity under an immunity statute, the Court stated (at 27), "Of course all *oral* testimony by individuals can properly be compelled only by exchange of immunity for waiver of the privilege." (Emphasis in the original.)

The registration provisions of the Act do not require the production of the records of the organization. On the contrary, they require the officers to prepare and file original statements. The majority below saw no distinction between the two requirements, stating (R. 2094) that the statements "are reproductions of or extracts from organization records" and therefore "'auxiliary to the production'" of the records themselves. Obviously, however, the statements are not "auxiliary" to the production of the records, since the Act does not require the records to be produced. Moreover, it makes no difference whether or not the statements are extracted from the organization's records. In either case, they are statements of the character which, the court stated in the *Wilson* and *White* cases, could not be compelled from the officers of a corporation or unincorporated association. Finally, since the registration statement must be filed before the record-keeping requirement of the Act becomes operative, it is not neces-

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[39] In *Wilson*, the Court said (at 377), "There is no question, of course of oral testimony, for he [the defendant] was not required to give any." In *White*, the Court pointed out (at 701) that compelling production of the records of the organization would not infringe the Fifth Amendment's "historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records."

sarily true that the statement is a "reproduction or extract from" records.[40]

The holding below that the privilege does not extend to statements prepared from records is contrary to the Second Circuit's decision in *United States* v. *Daisart Sportswear Inc.*, 169 F. 2d 856, rev'd on other grounds, *Smith* v. *United States*, 337 U. S. 137. There the court said (at 862):

> "The further point is made that Smith, in effect, but summed up what the books of the corporation contained. Coupled with this is the contention that an individual may be compelled to give oral testimony that is explanatory of its records . . . We think, though, the production of records must be distinguished from oral testimony as to what the records would contain, had they been produced."[41]

The rule of *White, Wilson,* and *Shapiro* is inapplicable for another reason. In those cases the privilege was invoked on the ground that the *contents* of the records would incriminate the witness. Here it is not the contents of the records which are incriminating, but the connection with the organization of the person making the statement. As

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[40] "The execution of a registration statement by an individual would at least require him to confirm and transpose selected material from the organization's records to the registration statement. Since an organization need not keep complete records prior to registration, in many cases the officer would be forced to execute the registration statement by relying on his own knowledge. It is clear that in both instances the officer is doing more than producing records and identifying them. He is disclosing other matters of his personal knowledge." Note, The Infernal Security Act of 1950, 51 Col. L. Rev. 606, 621, quoted in Judge Bazelon's dissent (R. 2160).

[41] Even if all that the Act compelled was the production of records of the organization, the holdings of *Wilson, White* and *Shapiro* should not be extended to a case such as this, where the records are those of a political organization active in the area protected by the First Amendment. For the privilege against self-incrimination was primarily designed as a protection for political freedom and the right of dissent. Griswold, *The Fifth Amendment Today* (1955), p. 8.

the dissent below pointed out (R. 2159), the privilege here arises from the fact that registration compels those who sign the registration statement thereby to identify themselves as members and officers of the Communist Party and as persons who are familiar with its records and have intimate knowledge of its workings. These are precisely the admissions which *Blau* holds cannot be compelled.

2. The majority below further held (R. 2159) that the adjudication of the question of privilege is premature in this proceeding and must await a criminal prosecution for the failure of the officers to file a registration statement. The majority assigned three grounds for this conclusion.

(a) Citing the familiar principle that the privilege is lost if not asserted, the majority held that the question presented may never arise since the officers may not claim the protection of the Fifth Amendment (R. 2096-2097).

The principle relied on is inapplicable however. For the Act gives the officers no opportunity to claim the privilege and provides no tribunal before which they can make the claim. Under the Act, the officers must file the registration statement within thirty days after a registration order becomes final. Their failure to do so results in their indictment under section 15. Nothing but a time lapse intervenes between failure to file and indictment. Obviously, if there is no opportunity to assert the privilege, it cannot be lost for non-assertion. Since the privilege is a protection against prosecution, as well as against conviction, it must be available before prosecution. Under the Act it is not available, unless in this proceeding.

It cannot be suggested that the officers must create the opportunity to claim the privilege by notifying the Attorney General that they will not file the registration statement because to do so might incriminate them. This notification would be an admission to the chief prosecutor that the individuals are officers of petitioner. Such an admission is itself incriminating. Hence to require the offi-

cers to assert the privilege in this manner would be the equivalent of requiring them to incriminate themselves by filing the registration statement.[42]

The doctrine that the privilege must be asserted in order to be relied upon is, accordingly, inapplicable here. The function of the doctrine is to put the tribunal on notice that in the particular instance a particular witness may be entitled to the protection of the privilege, and to allow the tribunal to rule on the subject. *Vajtauer* v. *Commissioner*, 273 U. S. 103, 113. No such function can be served in this case, where it appears from the face of the statute that the act of filing the registration statement is itself necessarily incriminating. The situation of the officers of an organization ordered to register is like that of a defendant in a criminal case. Like him, they cannot be compelled to "take the stand" and claim their privilege in order to enjoy it.

If the conclusion reached by the majority were sound, it would follow, as the court itself recognized (R. 2100), that legislation which on its face compels incriminating testimony could never be declared unconstitutional, but could only be held to be unenforceable in particular cases where the privilege was asserted. This is clearly not the law. The Court has held a statute "unconstitutional and void" because it was apparent from its face that it compelled the production of incriminating evidence. *Boyd* v. *United States*, 116 U. S. 616, 638.[43] And state courts have invalidated state statutes similarly compelling self-incrimi-

[42] To require an officer so to notify the Attorney General would also require him to invite prosecution under section 15 of the Act for not registering.

[43] The majority below attempted to distinguish the *Boyd* case (R. 2100-01) on the grounds that the compelled evidence (1) consisted of "personal, private papers," and (2) was "directly for use in a forfeiture case under a criminal statute." These distinctions are unsound. As we have already shown, the privilege applies to statements as to the content of organizational records just as it does to personal papers. And it applies to leads to incriminating information as well as to evidence which is "directly" incriminating.

nation,[44] including two which required Communist Party members to register.[45]

(b) The majority below suggested (R. 2099) that petitioner's officers may not be entitled to the privilege because some of them were convicted of conspiring to violate the Smith Act, some have publicly asserted their membership, and two identified themselves as officers in testifying before the Board. This suggestion is based on the unwarranted assumption that the persons referred to by the court will be petitioner's officers at the time registration is required. Even if they are, it is obvious that none of the factors alluded to by the court will strip them of their privilege. The conviction of some under the Smith Act is no bar to other indictments for subsequent or different offenses under the same statute[46], or under section 4(a) of the Act, or the other criminal statutes referred to above. The facts that some of the officers have made extra-judicial admissions and that two of them testified about their offices before the Board do not constitute waivers of the privilege with respect to the registration statement. For it is settled that admissions made extra-judicially, in another proceeding, or even at different stages of the same proceeding, do not waive the privilege. *Re Neff*, 206 F. 2d 149, and cases cited therein at 152; *United States* v. *Field*, 193 F. 2d 109; 8 Wigmore on Evidence (3rd Ed.) sec. 2276(4). In any event the suggestion that some of the officers may have waived the privilege obviously cannot apply to other officers as to whom no waiver is claimed.

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[44] *In re DeWar*, 148 Atl. 489 (Vt.); *People* v. *Reardon*, 90 N. E. 829 (N. Y.); *State* v. *Simmons Hardware Co.*, 18 S. W. 1125 (Mo.).

[45] *People* v. *McCormick*, 228 P. 2d 349 (Calif.); *Maryland* v. *Perdew*, 19 U.S.L. Week 2357 (Md. C.C., Alleghany County).

[46] In fact, all of the eleven defendants convicted in *Dennis* v. *United States*, 341 U. S. 494, are also under pending indictments for violating the membership provisions of the Smith Act, 18 U.S.C. 2385.

(c) Finally, the majority below suggested (R. 2099-2100) the possibility that the Attorney General might meet the officers' claim of privilege by invoking the procedure under the new immunity statute, 18 U. S. C. 3486. That statute, however, has no application to the filing of registration statements under the Act. It applies only to the giving of testimony and the production of documents before Congressional committees, federal grand juries, and federal courts.

It is clear from the foregoing that the privilege against self-incrimination is available to petitioner's officers and that the question of the constitutionality of the Act under the Fifth Amendment is ripe for decision at this time. The circumstances which give petitioner standing to assert the denial of due process to its members (see *supra*, p. 72) likewise support its standing to challenge the Act's violation of the constitutional privilege.

Coerced self-incrimination so pervades and infects the entire scheme of the Act that, as the dissenting judge below held, its invalidity on that ground can and should be adjudicated in this proceeding.

IX. The Act Violates the First Amendment.

The Act, as we have now seen, is saturated with gross violations of the elementary rules of fair procedure. These odious features—predetermination of guilt, irrational presumptions, a biased administrative tribunal, guilt by association, coercion of confessions—were designed for the one purpose of suppressing political dissent. Indeed, once the legislature embarked on so far-reaching a project to outlaw political non-conformity, it was inevitable that this police-state objective would be reached by police state procedures. The most fundamental vice of the Act, therefore, is its attempted destruction of the freedoms secured by the First Amendment.

In terms of the legal framework set by the precedents, this unprecedented Act involves three types of violations of the First Amendment. (1) It suppresses peaceable advocacy and assembly. (2) It imposes prior restraints on protected expression. (3) It imposes sanctions for the exercise of rights guaranteed by the First Amendment.

A. The Act Suppresses Peaceable Advocacy and Assembly.

Statutes affecting speech, press and assembly must be narrowly drawn to meet a substantive evil which the legislature has power to control. A statute penalizing conduct which lies outside the area protected by the First Amendment is invalid if it is so broad that it likewise abridges protected expression or assembly. *United States* v. *C. I. O.*, 335 U. S. 106; *Schneider* v. *Irvington*, 308 U. S. 147; *Thornhill* v. *Alabama*, 310 U. S. 88; *Cantwell* v. *Connecticut*, 310 U. S. 296, 308; *Jones* v. *Opelika*, 316 U. S. 584, 618 (dissenting opinion, adopted by the Court in *Jones* v. *Opelika*, 319 U. S. 103); *Saia* v. *New York*, 334 U. S. 558; *Winters* v. *New York*, 333 U. S. 507; *Stromberg* v. *California*, 283 U. S. 359; *DeJonge* v. *Oregon*, 299 U. S. 353; *Burstyn* v. *Wilson*, 343 U. S. 495.

The Act as a whole violates this principle, as does each of its major sanctions individually.

1. The Act as a Whole.

The justification of the Act, stated in section 2, is the alleged seditious and criminal activity of Communist-action organizations. But the Act's controls are not limited to the regulation or exposure of this or any other misconduct.[47] Instead, as we have shown (*supra*, pp. 28-33), the

[47] We have seen also that both the Board and the court below acknowledged that proof of seditious and criminal activity is not a prerequisite to the entry of a registration order (*supra*, p. 46).

Act and the order suppress all of petitioner's activities, including its admittedly extensive peaceable advocacy and assembly.

Whatever else may be asserted, petitioner concededly engages in peaceable political advocacy. Although always numerically small, it has run numerous candidates for public office, some of whom were elected, has participated in coalitions to elect non-Communist candidates, and has engaged in other political and economic activity within the tradition of American working class and socialist parties which preceded it. Even its worst enemies admit that it has frequently played a seminal role in bringing about needed changes in our social and economic life.[48] Many of the reforms advanced by petitioner and originally the object of vilification, have been adopted by the people of the United States, when they were convinced, with the aid of Communist agitation, that these were to their best interest. To name only a few: social security, minimum wage legislation, the organization of labor unions on industrial lines, and measures against racial discrimination. Like other political parties it seeks to help organize "the expression of bloc sentiment" which "is and always has been an integral part of our democratic and electoral process." *United States* v. *C. I. O.*, *supra*, at 143.

It is precisely this peaceable conduct which the Act is designed to reach. Other laws provide a plethora of sanctions for acts or advocacy of a seditious character and require the registration of foreign agents (see *supra*, p. 34, ftn. 8). The Act, however, proscribes the organization as a whole and with it all its advocacy, including lawful political expression, association and activity.

This dragnet approach of the Act is not permitted in the area of speech and assembly. Congress can outlaw acts which threaten the nation's security. Under *Dennis* v.

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[48] See, e.g., Tr. 3039-40, 14342-45.

United States, 341 U. S. 494, it can, in clear and present danger circumstances, prohibit advocacy of force and violence. But it cannot, in the guise of preventing such acts and advocacy, suppress peaceable political advocacy. Since the Act suppresses all advocacy and political activity of the Communist Party, and is not limited to (and is unnecessary for) suppressing illegitimate and dangerous conduct, it is invalid.

At the heart of the First Amendment furthermore, is the principle that government may not intervene in the political process by imposing special disabilities on any political group. Otherwise the party in power could perpetuate itself in office by denying its rivals free and equal access to the electorate. The Act clearly infringes this principle. For it discriminatorily prevents petitioner from engaging in political activities of a kind employed by other political parties and groups in their effort to attract the adherence of the public. As the President said of the Act in his special message, while it was pending in Congress, (*supra*, p. 6) it "would, in effect, impose severe penalties for normal political activities on the part of certain groups, including Communists and Communist Party-line followers," and it attempts to "proscribe for groups such as the Communists, certain activities that are perfectly proper for everyone else." In so doing, the Act not only deprives petitioner of its First Amendment rights, but also denies to the entire American people access to all varieties of political opinion and the right freely to make their own selections in the market-place of ideas.

These constitutional principles which the Act violates have been applied by the Court specifically to the Communist Party and its members. In *DeJonge* v. *Oregon*, 299 U. S. 353, and *Herndon* v. *Lowry*, 301 U. S. 242, the Court held that peaceable assembly and advocacy of the Communist Party and its members could not be abridged even if it were assumed that the Party engaged in illicit advocacy and activity.

The invalidity of the Act was foreshadowed in *American Communications Association* v. *Douds*, 339 U. S. 382. Although that decision sustained the non-Communist affidavit requirement of the Taft-Hartley Act, it did so only on the premise that the requirement did not substantially infringe the rights of individuals to belong to the Communist Party and the rights of the Party and its members to engage in peaceable advocacy.

Douds recognized (at 402) that a tax on the exercise of First Amendment freedoms would be invalid as a direct restraint comparable to imprisonment, fines, and injunctions. The Act's inhibitions on membership in petitioner and on its advocacy are far more onerous than a tax.

Douds stated (*ibid.*) that a requirement that adherents of particular political parties wear identifying armbands would "obviously" be invalid. Armbands are obnoxious because they identify the wearer as a member of a proscribed group and expose him to infamy. The registration and labelling requirements of the present Act fulfill exactly this function. They differ from an arm-band requirement only in technical detail.

The Act is condemned by *Douds* because it is "frankly aimed at the suppression of dangerous ideas" (*ibid.*). It involves "the elements of censorship" and "prohibition of the dissemination of information" (at 403). This legislation and the Board's order "restrain the activities of the Communist Party as a political organization" and "attempt to stifle beliefs" (at 404). The "discouragements" of the Act proceed "against the groups or beliefs identified" rather than against "the combination of those affiliations or beliefs with occupancy of a position of great power over the economy of the country" (at 403-404). The Act and registration order do not touch "only a relative handful of persons," and they do not leave "the great majority of persons of the identified affiliations and beliefs completely free from restraint" (at 404). On the contrary,

every member of petitioner is restrained by a variety of sanctions.[49] Those who are affected by the statute are subject not merely to "possible loss of positions" in trade unions (*ibid.*), but are coerced to abandon their political beliefs and affiliations by penalties which would brand them as criminals, subject them to public odium and vigilantism, and deprive them of their livelihood, citizenship, and right to travel.

Turning to Mr. Justice Jackson's opinion in *Douds*, we note (see at 434) that the impact of the Act and the Board's order are "to suppress or outlaw the Communist Party" and to prohibit it and its members from engaging in "above-board activity normal in party struggles." If this order is sustained, the petitioner may not continue to engage in political activities "just as other parties may." The Act and the order operate to prohibit an individual from becoming or remaining a "full-fledged member of the Party." They impose requirements and prohibitions on a person "merely because he is a member of, or is affiliated with, the Communist Party," and they apply to all members, not merely to those who are labor union officials.

Douds held that the impact of section 9(h) of the Taft-Hartley Act and the effect of its sanction upon the activities of Communist Party members were narrowly limited to the prevention of what Congress found to be a substantive injury to interstate commerce. Its approval of what was considered only an incidental infringement of civil rights rested on the view that Congress had acted economically to attain a constitutionally permitted objective.

In sharp contrast, the Act suppresses all the advocacy of petitioner and its members. The Act's invasion of the civil rights of Communists is not incidental to some other and legitimate legislative objective. It is an end in itself,

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[49] By virtue of section 5 of the Communist Control Act, these sanctions also restrain persons who are not members of petitioner within any legitimate meaning of the term.

its only other purpose being to use the denial of civil rights to Communists as a foundation for the abridgment of the constitutional liberties of non-Communists.

The Court upheld the statute in *Douds* because it considered that the Congress had acted with restraint. But in this Act Congress went beserk.

The legislative finding of section 2 that "the Communist organization in the United States . . . presents a clear and present danger" cannot rescue the Act.

In the first place, determination of this issue of constitutional fact is not within the province of the legislature, but is reserved to the courts. *Dennis* v. *United States*, *supra*, at 513. Clearly the First Amendment prohibits Congress from invading the prerogative of the electorate so as to proscribe political groups by the simple expedient of finding that they constitute clear and present dangers.

The existence of a clear and present danger must necessarily be a question for judicial rather than legislative determination because it concerns the constitutional application of a statute, not its inherent validity. The issues under the clear and present danger exception are whether the content of the expression and the circumstances under which it is disseminated give rise to the danger of a substantive evil that Congress has the power to prevent. Obviously these issues cannot be predetermined in advance by the legislature at the time it enacts a statute but must be decided by the courts, case by case, in the light of the nature of the particular expression and the circumstances of its utterance. In the Act, however, Congress declared that a Communist-action organization constitutes a clear and present danger for all future time without regard to the content of its advocacy or the conditions prevailing at the time the advocacy is engaged in. But a future or permanent clear and present danger is a contradiction in terms, and the effort to create one by legislation is patently invalid.

Secondly, an exception to the application of the First Amendment cannot be justified by a finding—even if made by the Court—that an organization whose activity includes peaceable advocacy is a clear and present danger. The clear and present danger exception has been and must necessarily be confined to particular conduct or advocacy which is found to be within the exception. Danger to the state can always be effectively dealt with by prohibiting such conduct. Suppression of the organization as a whole can have no foundation in necessity and thus wantonly abridges peaceable advocacy and association. This is precisely the significance of *DeJonge* v. *Oregon* and *Herndon* v. *Lowry, supra*, and the admonition in *Douds*, made without any qualification as to clear and present danger, that Congress may not outlaw the Communist Party, prohibit its peaceable political activity, or penalize membership in it.

In *Australian Communist Party* v. *The Commonwealth*, 83 C. L. R. 1 (1951), the High Court of Australia invalidated the Dissolution of the Communist Party Act. Although the case arose in a different constitutional setting, its principles are pertinent here. The statute in question dissolved the Communist Party, authorized the executive to dissolve other organizations found to be under Communist influence or control, and imposed civil disabilities on Communist Party members. It contained a recital of parliamentary findings with reference to Communism in substantially the terms employed by section 2 of the Act. The Commonwealth urged that the law was authorized under the defense power vested in the federal government by the Australian constitution. The High Court answered this argument, in the words of one of the prevailing opinions, as follows (at 225-227):

> "Any conduct which is reasonably capable of delaying or otherwise being prejudicial to the Commonwealth preparing for war would be conduct which could be prevented or prohibited or regulated under the defense power. Amongst such conduct there could be included, I should think, most if not all, of the seri-

ous misdoings with which communist bodies and communists are charged in the recitals. But the legislation would have to define the nature of the conduct and the means adopted to combat it, so that the court would be in a position to judge whether it was reasonably necessary to legislate with respect to such conduct in the interests of defense and whether such means were reasonably appropriate to the purpose . . . But none of this conduct is prevented or prohibited or made an offense by the operative provisions of the Act . . . In my opinion legislation to wind up bodies corporate or unincorporate and to dispose of their assets or to deprive individuals of their civil rights or liberties on the mere assertion of Parliament or the Executive that they are conducting themselves in a manner prejudicial to security and defense, is not authorized by the defense power or the incidental power in peace time."

And as another one of the Justices put it (at 187-188):

"In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based upon a conception, if otherwise adequate, adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the forms of government they defend."

The High Court's decision demonstrates a sound awareness of a minimum requirement for the preservation of a free society in the face of spurious appeals to "internal security." Its principles must be applied here if Americans are to be as free as Australians.

The court below stated that for the purpose of passing on the constitutionality of the Act, it was required to assume that the conditions with which the Act purports to deal "actually exist," and that these conditions, as recited in section 2, are that, "There exists a world Communist movement . . . whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism and any other means

deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world . . ." (R. 2085). The court concluded that the Government "has power to prohibit within its borders activity of the sort described; *a fortiori* it has power to require identification of such activities and to impose restrictions short of proscription" (R. 2087).

Undoubtedly, Congress has the power to punish, control or expose espionage, sabotage, terrorism and other criminal "activity of the sort described" in section 2. But that premise does not support the constitutionality of the Act. In the first place, as the court below acknowledged (see *supra*, p. 46), the sanctions of the Act may be imposed upon an organization without proof that it engages in any "activity of the sort described." Secondly, as we have seen, the sanctions of the Act are not limited to the identification or control of "activity of the sort described" and are unnecessary for that purpose. Their real impact is upon activity of a completely different sort—peaceable political advocacy and association.

The court's failure to appreciate these two points invalidates all of its First Amendment discussion. Thus the court does not deny that a registration order is an edict of outlawry. It states, however (R. 2016):

> ". . . If an organization is actually operating primarily to achieve the objectives of a foreign organization dedicated to the establishment of a totalitarian dictatorship in this country *by other than constitutional processes*, we perceive no constitutional obstacle to its outlawry." (Emphasis supplied.)

This statement is inapplicable to the Act in the light of the court's acknowledgement that proof of the use of advocacy of "other than constitutional processes" is not a prerequisite to the issuance of a registration order of outlawry. Moreover, the statement is erroneous. The facts assumed by the court would, at most, justify restraints on

the use or advocacy of "other than constitutional processes." They could not justify the abridgement of peaceable advocacy and assembly.

Again, the court below stated (R. 2088):

> "The activities of a world Communist movement such as that described in this statute and of organizations in this country devoted to its objectives constitute a clear and present danger within the meaning of any definition of the point at which freedom of speech gives way to the requirements of government security."

This statement repeats both of the errors we have already discussed. It overlooks the facts that the Act does not require proof of "dangerous" activities and that it suppresses peaceable advocacy and assembly.

Furthermore, the court's reliance on the clear and present danger exception is faulty for the reasons we have earlier stated (*supra*, pp. 96-97). Accordingly, the court's reference to the *Dennis* case (R. 2089-90) is misplaced. *Dennis* decided only that a conspiracy to advocate the violent overthrow of the government under conditions prevailing in the summer of 1948 constituted a clear and present danger. Here no such conspiracy or advocacy was found, and the registration order proscribes all of the petitioner's advocacy forever, regardless of prevailing conditions.

2. The Sanctions of the Act Considered Individually.

In passing upon the constitutionality of the Act the individual sanctions cannot be abstracted from their setting in the statutory scheme whose purpose and effect is to outlaw petitioner. But even if the major sanctions of the Act are examined separately, it is clear that each of them violates the First Amendment.

The court below held that the individual sanctions were valid on the ground that "each sanction is reasonably re-

lated to the substantive evil at which Congress was aiming" (R. 2109). But this is not the test for determining whether the First Amendment is infringed. In the area of speech, press and assembly, "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." Restrictions on First Amendment rights "must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." *Thomas* v. *Collins*, 323 U. S. 516, 530.

Each of the major sanctions of the Act violates this First Amendment test. Moreover, the court below notwithstanding, each also violates the due process test.

(a) Section 5 makes membership in an organization finally ordered to register a conclusive bar to all federal employment, including the most non-sensitive. It excludes considerations of scienter, personal innocence, fitness, and the nature of the job in question. Its prohibition rests merely on the fact of association. Even this association need not be with a group that engages in illegal conduct, for, as the court below held, the Act does not require proof of such conduct. The Act thus goes far beyond the much-criticized loyalty-security program established by executive orders. Under that program, organizational membership is not a conclusive disqualification, but "is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case." 5 C. F. R. App. A, p. 200; quoted in *Joint Anti Fascist Refugee Committee* v. *McGrath, supra*, at 205. See also *Kutcher* v. *Gray*, 91 App. D. C. 266, 199 F. 2d 783.

Clearly, the government employment sanction of the Act has no reasonable relation to protection of the federal service, is without foundation in the public interest, and

is not addressed to a clear and present danger. The *Adler* case, *supra*, though relied on by the court below, itself establishes that the sanction is invalid because it creates a conclusive disqualification on the basis of association alone.

(b) The sanction of section 5 with respect to employment in "defense facilities" has all the defects of the sanction against governmental employment. Yet it cannot even be defended on the basis that the government has a special interest in and power over its own employees. In addition, the sanction is invalid because the Act delegates unfettered and unreviewable authority to the Secretary of Defense to designate any private enterprise as a "defense facility," and thus by ukase to deny members of Communist-action organizations any employment, including the most non-sensitive. This fact alone demonstrates the unsoundness of the justification advanced for this sanction by the court below—that it involves "sensitive business" (R. 2111). Moreover, the sanction applies to non-sensitive jobs in sensitive businesses.

(c) Section 5(a)(2), which makes it unlawful for employee of the government or of "defense facilities" to contribute to a Communist organization, is a plain violation of the principle of economy demanded by the First Amendment. The prohibition is imposed without regard to the purpose of the contribution and the use made of it, both of which may be entirely innocent and even praiseworthy. Clearly, Congress cannot make it an offense to contribute to the promotion of good causes through the device of characterizing the promoter as "bad." Furthermore, under the definition of "contribution" (sec. 3(6)), the section makes it criminal for federal and defense facility employees to subscribe to any publication of a proscribed organization, regardless of the publication's nature and content. Clearly this is a crass violation of freedom of the press.

(d) The sanction against trade-union employment[50] is another blatant example of the unconstitutional blunderbuss technique of the Act. *Douds* sustained section 9(h) of the Taft-Hartley Act as a valid exercise of the commerce power because its "discouragement" did not proceed against the affiliations or beliefs of the officers of trade unions "but only against the combination of those affiliations and beliefs with occupancy of a position of great power over the economy of the country." Section 5(1)(E), however, does not purport to be an exercise of the commerce power, and the impact of its prohibition is not limited to officers and employees of trade unions whose members are engaged in interstate commerce. Nor are the "discouragements" of that section confined to persons who occupy positions of power over the national economy. On the contrary, the reach of section 5(1)(E) extends to every employee of every trade union. Accordingly, a member of a Communist organization finally ordered to register is liable to a five-year prison term and a $10,000 fine for the "crime" of holding a job as a janitor for a local of the Musicians Union (secs. 5(1)(E) and 15(b)).

(e) Section 6 makes it unlawful for members of Communist organizations finally ordered to register to apply for or use passports. Since it is now a criminal offense to travel outside of the Western Hemisphere without a passport,[51] the section prohibits foreign travel elsewhere by members of Communist organizations. Congress may, of course, make it a crime to travel abroad for the purpose of promoting or consummating activity of a criminal character. But the prevention of criminal activity may not be used as the pretext for prohibiting foreign travel for en-

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[50] Sec. 5(1)(E), added by sec. 6 of the Communist Control Act.

[51] 8 U.S.C. 1185 (b) and Presidential Proclamation No. 3004 of January 17, 1953, 18 Fed. Reg. 489. See *Schachtman* v. *Dulles*, C.A.D.C., No. 12406, June 23, 1955, not yet reported.

tirely legitimate purposes.[52] Yet this is what Congress did in section 6, which is based on the invalid premise that foreign travel for any purpose by members of Communist organizations is inherently evil and may be prohibited.

The court below sustained section 6 on the ground that the government may reasonably decline to confer its diplomatic protection on members of Communist organizations (R. 2011-12). But this ground cannot sustain what the government has done by section 6 in the context of other legislation. Since the government has itself made it illegal to travel abroad without a passport, it must justify denials of passports as denials of the right to travel, and not merely as denials of governmental protection. Section 6 cannot be so justified in view of its sweep. Indeed, the reasoning of the court below has been repudiated by the same circuit in the later decision of *Schachtman* v. *Dulles*, No. 12406, decided June 23, 1955, not yet reported.

(f) Section 25 of the Act (carried forward in section 340(c) of the Immigration and Nationality Act) makes membership by a naturalized citizen, within five years after naturalization, in an organization ordered to register under the Act, prima facie evidence sufficient to authorize the revocation of his citizenship in a denaturalization proceeding. This violates the First Amendment, which prohibits revocation of citizenship for mere association. *Schneiderman* v. *United States*, 320 U. S. 118; *Knauer* v. *United States*, 328 U. S. 654, 669; *Baumgartner* v. *United States*, 322 U. S. 665. These cases involved association at the time of naturalization. The Act presents an aggravated case, since it presumes fraudulent procurement of naturalization on the basis of association *after* naturalization.

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[52] Similarly, a postal fraud order may make communications relating to a fraudulent scheme non-mailable. But it may not close the mails to innocent communications of the offender. See *Donaldson* v. *Read Magazine*, 333 U. S. 178, 191-92.

The court below (R. 2114-15) avoided a decision on the validity of the denaturalization sanction on the ground that the issue must await determination in a denaturalization proceeding under the section. However, the presence of this section in the Act causes immediate harm to petitioner by making membership in it prohibitive for naturalized citizens. The issue is therefore ripe for adjudication, and petitioner has standing in this proceeding to challenge the validity of the section on its face (see *supra*, p. 72).

(g) Section 10 requires an organization ordered to register to label all its mail and broadcasts as emanating from a Communist organization and hence as the product of a group that has been officially condemned as a seditious foreign agent. Obviously these requirements effectively restrain freedom of press and expression. They cannot be justified as protective measures or as safeguards against danger since they apply regardless of content.

The court below analogized section 10 to the mail fraud statutes (R. 2112). But the analogy is faulty because the restraints of the latter are based on the content of the mail, not on the character of the sender or recipient.[53] The power to prevent fraudulent communications cannot be employed to restrain those innocent of fraud. *Donaldson v. Read Magazine*, 333 U. S. 178, 191-92, sustained a post-office fraud order against a First Amendment attack because the order was limited to communications relating to the particular fraudulent scheme, leaving other communications of the offending publication untouched. Simi-

[53] The court also cited provisions of the Federal Trade Commission and the Securities and Exchange Acts barring the mails to fraudulent advertisements for merchandise and to offers or sales of unregistered securities (R. 2112). Thus the court again confused the power of Congress to regulate commercial transactions under the due process clause with its power to restrain speech and assembly under the First Amendment (see *supra*, pp. 100-01; *infra*, p. 109). Furthermore, these statutes, like the mail fraud statutes, regulate on the basis of content.

larly, the Postmaster General may not ban future issues of a magazine from the mails because past issues contained obscene matter. *Summerfield* v. *Sunshine Book Company*, 221 F. 2d 42, cert. den. 349 U. S. 921. Section 10, however, restrains all future literature and broadcasts of the organization, which are necessarily of unknown content.

The section cannot be analogized to the Congressional power to exclude fraudulent matter from the mails for the additional reason that the power does not and cannot constitutionally apply to matters of opinion. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Reilly* v. *Pinkus*, 338 U. S. 269. The present case presents an even stronger claim to First Amendment protection than *American School of Magnetic Healing* and *Reilly*, since it involves opinion on political questions.

The court below also defended section 10 by citing the labelling provisions of the Foreign Agents Registration Act (R. 2113). But the controls of that statute, as construed in *Viereck* v. *United States*, 318 U. S. 236, are limited to activities conducted by the agent on behalf of his foreign principal. Furthermore, the label is not an invidious one. Section 10 of the Act, however, requires communications to be labelled as emanating from a seditious foreign agent even though they are made in the organization's own behalf and are innocent of seditious content.

The court below also compared section 10 to statutes requiring that paid broadcasts be identified by the name of the purchaser and that literature on behalf of candidates for federal office bear the name of the issuer (R. 2111-12). These provisions, however, are non-invidious and non-discriminatory, and hence do not "discourage" the exercise of First Amendment rights. The failure of the court below to appreciate the difference between such requirements and the provisions of section 10 is indicated by its statement (*ibid.*) that petitioner has little to choose between identifying itself as "the Communist Party"

and as "a Communist organization." Of course petitioner does not object to identifying itself by name, which it does voluntarily in the conduct of its activities as well as pursuant to statutes of the kind referred to by the Court. This is entirely different, however, from the discriminatory requirement of section 10 that it identify itself with an invidious label or "arm-band" signifying that it has been governmentally condemned as a seditious conspirator and foreign agent. The fact is that section 10 does not identify petitioner, but deprives it of an audience and denies others access to its ideas.

As the foregoing analysis shows, none of the sanctions under discussion is designed to control criminal or seditious conduct or is addressed to any other legitimate governmental objective. Even when each is considered individually, it flagrantly abridges liberties protected by the First Amendment. In the context of the entire Act, the sanctions confirm our contention that the Act outlaws or destroys organizations ordered to register and ruins their members.

B. The Act Imposes a Prior Restraint on the Exercise of First Amendment Rights.

The Act and the order require petitioner to register as a participant in the international criminal conspiracy alleged in section 2 before it can lawfully engage in political advocacy or exercise any other right secured by the First Amendment. The registration statement must detail information on finances and members and must list all printing presses, mimeograph machines, etc., in the possession of the organization, its officers and members, and groups in which it "has an interest."

As we have already shown (*supra*, pp. 28-33), the registration requirement is an integral part of the invalid statutory scheme to outlaw petitioner. But even if the registration provision is divorced from the remainder of the Act, it is unconstitutional as a prior restraint on the exercise of First Amendment rights.

Thomas v. *Collins*, 323 U. S. 516, establishes that the exercise of speech and assembly may not be conditioned on prior registration with governmental authorities. There the Court stated (at 539):

> "If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order."

The prior restraint invalidated by *Thomas* v. *Collins* was far less onerous than that imposed by the Act. The statute there involved merely required registration of the name and trade union affiliation of labor organizers who wished to solicit union membership. The registration did not, as here, involve an opprobrious characterization, nor did it require the identification of the union's members for subjection to intolerable sanctions.

The court below stated (R. 2090) that "the protection which surrounds speech, does not encompass action." In support of that obvious proposition, it quoted from *Thomas* v. *Collins* (at 540) to the effect that when a speaker does more than exercise First Amendment rights, "as when he undertakes the collection of funds or securing subscriptions," a reasonable identification requirement may be imposed. From this statement, the court below concluded (R. 2091):

> "If the mere solicitation of funds for a lawful cause is sufficient conduct to validate the restrictive police power of a state, operation to achieve the objectives of a movement such as this statute describes is conduct sufficient to invoke federal regulatory power."

Thus the court's justification of the registration requirement rested on the ground that the thrust of the Act is not against protected expression and assembly but against conduct to achieve the violent, seditious and criminal objectives

set forth in section 2. The distinction is fallacious for three reasons.

First, as the court acknowledged (see *supra*, p. 46), the Act does not require proof that the organization engages in or advocates violent, seditious or criminal conduct as a prerequisite to the imposition of the previous restraint of a registration order.

Second, even if the Act required such proof, the registration requirement would still be invalid because it does not merely inhibit violent, seditious or criminal conduct or advocacy, but restrains peaceable expression and assembly. (See *supra*, pp. 91-92.) As *Thomas* v. *Collins* itself states (at 540), where expression or assembly within the guarantee of the First Amendment is accompanied by conduct which may validly be restricted, the restriction must be applied "in such a manner as not to intrude upon the rights of free speech and assembly."

Finally, even if registration were required only as a condition to the advocacy of the violent overthrow of the government, it would nevertheless be unconstitutional, as well as grotesque. *Dennis* held that such advocacy may be punished only if engaged in under circumstances that create a clear and present danger. The logic of that decision necessarily invalidates a prior restraint which effectively abridges such advocacy under any and all circumstances. See *Thomas* v. *Collins*, *supra*, at 530.

The court below analogized the registration provisions of the Act to licenses required of "doctors, lawyers, restaurants and barbers" (R. 2109). The heart of *Thomas* v. *Collins*, however, is that speech and assembly cannot be subjected to restrictions which are perfectly valid when employed to regulate business or professions (see at 530, 545).[54]

[54] The failure of the court below to recognize this distinction is also shown by its citation (R. 2091, ftn. 19) of *Breard* v. *Alexandria*, 341 U. S. 622, in which a majority of the Court sustained an ordi-

The court also supported the validity of the registration provision by references to the Lobbying and Foreign Agents Registration Acts (R. 2109). This Court, however, sustained the Lobbying Act only after limiting its application to persons who collect or receive contributions for the purpose of influencing, and whose main purpose it is to influence, legislation by direct communication with members of Congress. *United States* v. *Harriss*, 347 U. S. 612. As so limited, the Court held the statute valid because (at 625, emphasis added):

> "It has merely provided for a modicum of information from those who *for hire* attempt to influence legislation or who *collect or spend funds* for that purpose. It only wants to know who is being hired, who is putting up the money, and how much."

The statute thus construed is within the principle recognized in the *Thomas* case that a reasonable identification or registration requirement may be imposed on one who solicits funds. Furthermore, as *Harriss* plainly indicates, a registration requirement even under these circumstances would be of doubtful validity if it demanded the registration of persons who seek to influence legislation by means other than direct communication with members of Congress. Cf. *United States* v. *Rumely*, 345 U. S. 41. The Act has neither of the saving graces of the Lobbying Act. Registration of Communist organizations is not made dependent on the collection of funds and is a precondition to every form of speech, writing and assembly, irrespective of purpose and without regard to the class of persons sought to be influenced.

This Court has never passed upon the constitutionality of the Foreign Agents Registration Act, 22 U.S.C. 601-620 which, in at least some of its applications, is a regulation

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nance regulating house-to-house solicitation of magazine subscriptions on the ground that the "commercial feature" of this activity made it susceptible to regulation.

of commercial or professional relations between foreign agents and their principals. Moreover, it is significant that the one decision of the Court under that act reversed a conviction on the ground that the statute had not been narrowly construed and applied by the trial court. *Viereck* v. *United States*, 318 U. S. 236, discussed *supra*, p. 106.

Finally, the registrations under the Lobbying and Foreign Agents Registration Acts require only "a modicum of information" and involve no self-defamation by the registrants.

Passing from the act of registration to the information demanded of registrants, the court below defended the requirement for a financial accounting (sec. 7(d)(3)) on the ground (R. 2110) that this "is no more than is required of any political party, and since petitioner claims to be a political party we see no invalidity in the application to it of such a requirement." Petitioner, of course, is not here attacking the validity of the Corrupt Practices Act (2 U.S.C. 244), with which it, like other political parties, complies. What petitioner does object to is that, under the guise of securing information as to its finances, Congress has discriminatorily singled it out from all other political parties and required it to register as a criminal conspirator as a precondition to its lawful engagement in political advocacy.

The court below found the requirement that petitioner list the names of its members (sec. 7(d)(4)) "similar to the customary requirement in the states that persons participating in the activities of a political party, such as primaries, conventions, etc., register publicly as members" (R. 2110). Obviously, the two requirements have nothing in common. The provisions for registration of party affiliation in connection with primaries are purely voluntary and non-discriminatory, while the Act coerces an identification only of petitioner's members.

A statute which required the Republican and Democratic Parties to make even a non-opprobrious public listing of

their members would be clearly invalid as an invasion of the right to privacy of political opinion and affiliation. It is even more necessary to safeguard this right in the case of unpopular minorities, as is revealed by the history of the early Jeffersonians, the abolitionists, and trade unions. Anonymity of membership in unpopular groups, and especially in minority parties, is indispensable to freedom of political action. Almost every minority group which ever advocated substantial social change has been the object of bitter attack and public vituperation. All of them, including every new political party, would have been strangled in infancy if they had been required to reveal the names of their members. To permit this handicap to be imposed on a minority party by a legislature composed of its political opponents is to destroy the electoral process.

The court below ignored the requirement that the registration statement list all printing presses, mimeograph machines and the like in the possession of the registrant, its officers or members, or other groups in which it "has an interest" (sec. 7(d)(6), added by 68 Stat. 586). The premise of this section is that words are inherently dangerous and that instruments for their emission may be registered and regulated like guns. The section has been aptly characterized as "a part-way throwback to concepts of press licensing obsolete in the English-speaking world for centuries." [55]

The same monstrous premise underlies the Act's registration and labelling requirements. Their theory is that all of petitioner's advocacy, regardless of content, can be proscribed because it emanates from an organization governmentally branded as "dangerous."

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[55] Chicago Daily News, quoted in 100 C.R. 14401 (daily pagination).

C. The Act Imposes Sanctions for the Exercise of Rights Guaranteed by the First Amendment.

The evidentiary standards of section 13(e) focus on views and policies and their expression. The first standard relates to the method of formulation and purpose of policies, the second to "non-deviation" of views and policies, the fourth to instruction and training, and the fifth to reporting. The sixth (discipline) and the eighth (allegiance) involve subjective attitudes.

None of the standards, as we have seen, has the remotest relation to the criminal acts attributed to Communist organizations by section 2 of the Act. Indeed, most of the standards have no relation to acts at all, but only to views and expression.

Furthermore, under section 13(e), the content and nature of the views and expression are irrelevant. They need not be dangerous, much less create a clear and present danger. They need not be false or seditious, but may be objectively true and in the interests of the American people. In effect, views and expression form a basis for penalties simply because they are similar to views expressed by spokesmen for the Soviet Union.[56]

The Act thus profoundly infringes the First Amendment by imposing a malignant political censorship. Congress may not restrain the dissemination of ideas because they are considered false. *Thomas* v. *Collins,* 323 U. S. 516, 545; *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624. Much less may it restrain ideas without reference to their truth or falsity.

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[56] The court below acknowledged (R. 2121) that the "directives and policies" criterion (sec. 13(e)(1)) does not require a showing that petitioner's objectives are evil or morally wrong, much less that they are criminal or violent. It further acknowledged (R. 2122) that the "non deviation" criterion may be satisfied by evidence of policies calculated to secure the peace and welfare of the American people.

Under the outermost limits of Congressional power to restrain speech, staked out in *Dennis* v. *United States*, *supra*, Congress cannot control even the advocacy of violence in the absence of circumstances that create a clear and present danger. Much less, therefore, can it impose penalties for the advocacy of peaceable action, which can never give rise to clear and present danger. Because the registration requirements and other sanctions of the Act are reprisals for peaceful advocacy, they are invalid.

In addition, the sanctions on members of the organization are invalid because they penalize innocent association. The members are denied constitutionally protected rights and privileges merely because of their association, and without regard to their own conduct and personal innocence.

This imputation of guilt for association violates the Constitution. "Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application." *Kotteakos* v. *United States*, 328 U. S. 750, 772. See also *Schneiderman* v. *United States*, 320 U. S. 118, 136; *Bridges* v. *Wixon*, 326 U. S. 135, 163; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, *supra*, at 178-79.

The Court has twice flatly held that a person cannot be penalized for participation in peaceable advocacy of the Communist Party even if it be assumed that the Party also advocates doctrines of force and violence. *DeJonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242. As the Court stated in the *DeJonge* case (at 365-66):

> "We are not called upon to review the findings of the state court as to the objectives of the Communist Party. Notwithstanding these objectives, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by that Party. The defendant was none the less entitled to discuss the public issues of the day and thus in a lawful manner, without incitement to violence or crime, to seek redress of alleged grievances. That was of the essence of his guaranteed personal liberty."

Section 5 of the Communist Control Act carries the vices of the original Act a step further. Under that section, protected expression and association are given one more illegitimate use, this time to identify the persons who are to be victimized as "members" of petitioner. As we have seen (*supra*, pp. 77-80), an individual's association with officers or members of petitioner may be for the most innocuous of purposes, his spoken and written advocacy may be in behalf of the most praiseworthy of objectives, yet he may lose his livelihood, reputation and liberty because, under the criteria of section 5, these entirely innocent activities are indicia of "membership" in petitioner.

The court below (ignoring section 5 of the Communist Control Act) sustained the Act on the ground (R. 2121):

> "Our government may well oppose the establishment in this country of a totalitarian dictatorship of the sort described in the definition, even if such a dictatorship does not meet the definition of 'evil' or if it has many beneficent features."

This statement is beside the point. Perhaps the government in power may "oppose" the establishment of another form of government in this country. So Republicans may "oppose" Democrats by charging that the New Deal and Fair Deal were attempting to introduce "socialism" into the United States or that "the Democratic Party is the captive of a left wing group in the United States that is part of a world-wide Socialist network."[58a] But it does not follow that the Democratic Party could be outlawed if this charge were true.

The issue tendered in this case is not whether the government may "oppose" social change, but whether it may impose sanctions for the advocacy of change. Certainly, so long at least as the advocates of change confine themselves to peaceful persuasion and the use of democratic processes,

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[58a] Leonard W. Hall, Chairman of the Republican National Committee, *N. Y. Times*, October 2, 1953.

the government is limited to countering their advocacy with its own. It may not suppress the advocacy which it "opposes." If the First Amendment means anything, it prohibits Congress from abridging, let alone suppressing, the advocacy of political change by non-violent and constitutional means. *Stromberg* v. *California*, 283 U. S. 359, 369.

Mr. Justice Holmes, dissenting in *Gitlow* v. *New York*, 268 U. S. 652, 673, applied this principle to advocacy of a proletarian dictatorship:

> "If, in the long run, the beliefs established in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."

See also *Schneiderman* v. *United States*, 320 U. S. 118, 142-144.

The court below itself stated (R. 2116), "Unpopular causes are entitled to the privilege of the arena, but they must sustain the severe burdens of the arena." The privilege of the arena is all that petitioner demands. The unconstitutionality of the Act lies precisely in the fact that it denies petitioner that privilege solely on the ground that its cause is presently unpopular and that many of its views are similar to those held by Communists of other lands.

The rationale of the opinion below is not advanced by the statement (R. 2091):

> "Clearly the aim of the statute before us is at action and conduct rather than at mere speech and assembly. A purpose to establish a proletarian dictatorship, posited in paragraph (1) of Section 2 of the Act, is itself a program of action rather than mere discussion."

The purpose of all political expression and association is to persuade people to act. *Thomas* v. *Collins, supra,* at 537; *Terminiello* v. *Chicago,* 337 U. S. 1, 4. It is of the essence of the First Amendment, therefore, that advocacy of action is protected so long, at least, as the action advocated is peaceable. The court below further stated (*ibid.*), that "the terms used in paragraph (1) of Section 2 to describe the means adopted by the world Communist movement—infiltration into other groups, espionage, sabotage, terrorism—are terms of action." It is true that the advocacy of violent and criminal action of the character described, when engaged in under clear and present danger circumstances, can be penalized. But that fact cannot rescue the Act, since it does not require a showing either of such advocacy or of such a danger, and since the Act's inhibitions extend to peaceable advocacy.

"Heresy trials are foreign to our Constitution." *United States* v. *Ballard,* 322 U. S. 78, 86. Yet the Act outdoes the heresy trials which were banned by the First Amendment. Heretics were burned for promulgating or believing in doctrine supposed to be false and wicked. The Act, however, punishes political heretics for promulgating doctrine that may be true and good. It condemns all views, true or false, good or bad, merely because they resemble those of the Soviet Union. Thus it creates the strangest and most virulent of all heresies—"non-deviation," including "non-deviation" from the truth. In this respect the Act vividly demonstrates the accuracy of a recent letter of the General Council of the Presbyterian Church in the U. S. A., addressed to Presbyterians (N. Y. Times, Nov. 3, 1953):

> "The state of strife known as the 'cold war,' in which our own and other nations, as well as groups within nations, are now engaged, is producing startling phenomena and sinister personalities. In this form of warfare, falsehood is frequently preferred to fact if it can be shown to have greater propaganda value. In the interest of propaganda, the truth is deliberately distorted or remains unspoken. . . . According to the

> new philosophy, if what is true 'gives aid and comfort' to our enemies, it must be suppressed. Truth is thus a captive in the land of the free."

If the Act is sustained, there remain no effective limitations on Congress' control over political expression and association. If Congress can punish "nondeviation" from Soviet views, it can penalize "non-deviation" from other views. In fact, the provisions of the Act relating to front and infiltrated organizations, as well as section 5 of the Communist Control Act, already penalize "non-deviation" from views advanced or supported by petitioner.[57] And it is a commonplace today to label as "Communist views" whatever is distasteful to the speaker. Indeed, some of our most distinguished public figures have been accused by their political enemies of being under Communist influence,[58] following Communist policies, aiding Communist

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[57] The first petition filed under the Act by the Attorney General against a trade union alleges that it is Communist-infiltrated on the grounds, among others, that it has promoted the objectives of the Communist Party by advocating the following views: "The Union has opposed legislation enacted for the control and punishment of subversive activities, such as the Smith Act, the Foreign Agents Registration Act, the Taft-Hartley Act and the Communist Control Act; opposed the Selective Service Act, the draft extension act and the Defense Production Act; denounced Congressional Committees and other government bodies for investigating un-American and subversive activities; denounced government law-enforcement agencies, including the Federal Bureau of Investigation, the Immigration and Naturalization Service and opposed the registration and deportation of aliens; opposed the Federal employee loyalty program; supported and urged its members to support the Progressive Party; advocated clemency for Julius and Ethel Rosenberg, the "Trenton Six", Willie McGee and the "Martinsville Seven"; charged the United States government with the practice of genocide; and denounced American statesmen and industrialists as "warmongers." Petition in *Brownell v. International Union of Mine, Mill and Smelter Workers*, Docket No. 116-56, Subversive Activities Control Board.

[58] Cf. S. Res. 104, 84th Cong., 1st Sess., introduced by Senator Eastland, calling for an investigation of the sociological sources on which this Court relied in *Brown v. Board of Education*, 347 U. S. 483. The resolution recites that "a provisional investigation of the authorities on which the Supreme Court relied reveals to a shocking

objectives, and even of abetting treason. As Robert Maynard Hutchins has stated:

> "It is now fashionable to call anybody with whom you disagree a Communist or a fellow traveller. So Branch Rickey darkly hinted the other day that the attempt to eliminate the reserve clause in baseball contracts was the work of Communists. One who criticizes the foreign policy of the United States, or the draft, or the Atlantic Pact, or who believes that our military establishment is too expensive can be called a Fellow Traveller, for the Russians are of the same opinion. One who thinks that there are too many slums and too much lynching in America can be called a Fellow Traveller, for the Russians say the same. One who opposes racial discrimination or the Ku Klux Klan can be called a Fellow Traveller, for the Russians claim that they ought to be opposed. Anybody who wants any change of any kind in this country can be called a Fellow Traveller, because the Russians want change in this country, too . . . The miasma of thought control that is now spreading over the country is the greatest menace to the United States since Hitler." (Hearings of Illinois Seditious Activities Investigation Commission on University of Chicago and Roosevelt College, April 1949, pp. 20-21.)

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degree their connection with and participation in the world-wide Communist conspiracy," and that "the citation of these authorities clearly indicates a dangerous influence and control exerted on the court by Communist-front pressure groups and other enemies of the American Republic."

PART TWO

THE BOARD AND THE COURT BELOW APPLIED THE ACT ERRONEOUSLY AND IN VIOLATION OF THE CONSTITUTION

I. The Order of the Board and the Decision Below Are Based on Erroneous Interpretations of Section 13(e) and on Evidence Having No Rational Relation to the Criteria of that Section or to the Definition of a Communist-Action Organization

A. The Erroneous Interpretation and Application of Section 13(e)

Because relevant evidence was not available to prove that petitioner is a Communist-action organization, the standards of section 13(e) were designed to guarantee the issuance of a registration order against petitioner upon irrelevant evidence which was believed to be available (*supra*, pp. 46-53). It developed, however, that the Attorney General was unable to produce even the irrelevant evidence which might satisfy section 13(e). For this reason, the Board was compelled to misconstrue the criteria of that section and to rely on evidence which had no rational tendency to prove them or the section 3(3) definition. These errors of the Board, affirmed by the court below, become apparent upon examination of the Board's application of each criterion of section 13(e).

1. The "Directives and Policies" Criterion.

Under section 13(e)(1), the Board is directed to consider the extent to which an organization acts pursuant to Soviet directives or to effectuate Soviet policies. An analysis of the findings of the Board on this issue (R. 29-79), which were affirmed by the court below without discussion (R. 2147-2148), demonstrate that they were based on an irrational interpretation and application of this

criterion. In essence, the Board's conclusion that petitioner was currently acting pursuant to Soviet directives and to effectuate Soviet policies was based on the admitted fact that petitioner, like the Communist parties of the Soviet Union and other lands, is an adherent of the theory and practice of Communism, described as "Marxism-Leninism." Thus, while ostensibly applying section 13(e)(1), the Board in fact equated the "directives and policies" criterion with the "non-deviation" criterion of 13(e)(2), as erroneously applied by it (see *infra*, p. 137). In effect, it found that section 13(e)(1) was satisfied because the petitioner did not currently "deviate" from the principles of Marxism-Leninism as these were interpreted by the Board.

The Board found, as was undisputed, that petitioner was a member of the Communist International prior to November 1940, at which time it terminated its affiliation at a special convention called for that purpose (R. 14). As the Board further found, the Communist International dissolved in 1943 (*ibid.*).[59] It is undisputed, and was acknowledged by the court below (R. 2142), that petitioner has had no international affiliation since 1940.[60]

The Board found that prior to petitioner's 1940 disaffiliation from the Communist International, decisions and resolutions of that body were "directives" to petitioner

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[59] The Report suggests that petitioner's 1940 disaffiliation was spurious (R. 6, 14, 130). The court below did not adopt this suggestion, but found (R. 2141) that "The disaffiliation was an organizational separation." Moreover, the evidence refutes the Board's suggestion (see *infra*, pp. 202-03), which is irrelevant in any event since it is undisputed that the Communist International dissolved in 1943.

[60] The uncontradicted evidence is, as the court below found, that petitioner was never affiliated with the Communist Information Bureau and has had no dealings or relations with it (R. 65, 1209-10, 1286-89). As the evidence cited in the Report shows, membership in the Bureau is confined to the Communist Parties of eight European countries "for mutual consultation and voluntary coordination of action" (R. 7).

with which it complied (R. 10-13).[61] The Report cites no instance subsequent to 1940 in which petitioner received foreign directives within any legitimate meaning of that term. Moreover, petitioner's witnesses, Gates and Miss Flynn, testified without contradiction that during their tenure as members of petitioner's national committee,[62] petitioner received no foreign directives of any kind, but formulated and carried out its policies pursuant to its independent judgment as to the needs and interests of the American people (R. 1211, 1227, 1288-89).

The Board found, nevertheless, that petitioner's continued adherence to Marxist principles subsequent to 1940 established, *ipso facto*, that it acts pursuant to Soviet directives and to effectuate Soviet policy. This finding rests on absurd premises, and a misconstruction of section 13(e)(1).

Marxism-Leninism Is Not a Series of Directives.

The basic premise of this finding is that "Marxism-Leninism . . . has been promulgated and issued by the Soviet Union as the overall philosophy, authoritative rules, directives and instructions governing the world Communist movement," and that "by the acceptance of and adherence to Marxism-Leninism, [petitioner] subjects itself to the authority of the Soviet Union" (R. 78).

That this conclusion is the primary basis of the Board's order is evidenced by the fact that almost one-half of the Report is devoted to this asserted characteristic of

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[61] Inasmuch as petitioner had no international affiliation after 1940, it is unnecessary to argue that its voluntary affiliation to the Communist International and voluntary acceptance of the incidents of membership did not subject it to "domination and control" by that organization or by the Soviet Union.

[62] Gates and Miss Flynn had been members of the national committee continuously since 1945 and 1938 respectively (R. 1199, 1275).

Marxism-Leninism (R. 21-79) and by the Board's own statement that "the [Marxist] classics[63] are one of the chief means by which the C.P.S.U. directs, dominates and controls the C.P.U.S.A." (R. 43).

The Board's thesis is absurd on its face, and there is nothing in the record to support this phantasmagoria. As the Board itself acknowledged (R. 22), Marxism-Leninism is a system of thought which sets forth a unified and all-embracing view of man and nature. The writings of Marx, Engels, Lenin, Stalin and others in which this view is expounded and developed cover almost every area of human thought and activity, including economics, philosophy, history, political science, anthropology, natural science, and art (Tr. 15506-09). However one may disagree with the teachings of these books, it must be recognized that they represent a germinal system of thought which has had an enormous impact upon world history and the fields of human knowledge and endeavor with which they deal. They are studied in universities and colleges, and even the most vigorous opponents of their ideas concede that a general knowledge of their contents is indispensable to an understanding of the modern world. Yet the Board perceived in this comprehensive body of thought a set of "directives and instructions," "promulgated and issued" by the Soviet Union.

The Board also ignored the fact that Marxists themselves have always insisted and taught that the principles of scientific socialism are not "instructions," "directives," or blueprints for action. On the contrary, as Marx and Engels stated in their preface to the *Manifesto*, and as their followers have reiterated, "The practical application of the principles [of Marxism] will depend, as the *Manifesto* itself states, everywhere and at all times, on the historical conditions for the time being existing . . ." (A. G. Ex. 31,

[63] I.e., the writings of Marx, Engels, Lenin and Stalin (R. 21).

p. 7).[64] Similarly, the authoritative *History of the Communist Party of the Soviet Union* warns:

> "It may seem that all that is required for mastering the Marxist-Leninist theory is diligently to learn by heart isolated conclusions and propositions from the works of Marx, Engels, and Lenin, learn to quote them at opportune times, and rest at that, in the hope that the conclusions and propositions thus memorized will suit each and every situation and occasion. But such an approach to the Marxist-Leninist theory is altogether wrong . . . Mastering the Marxist-Leninist theory means being able to enrich this theory with the new experience of the revolutionary movement, with new propositions and conclusions, it means being able to develop it and advance it without hesitating to replace —in accordance with the substance of the theory— such of its propositions and conclusions as have become antiquated by new ones corresponding to the new historical situation." (A. G. Ex. 330, pp. 355-56).

Furthermore, the Board made its findings in the face of the fact that all of the works of Marx and Engels and most of those of Lenin to which the Report refers were written long before there was a Soviet Union. According to the Board, the *Communist Manifesto*, published in 1848, was "promulgated and issued" by the Soviet Union some time after the 1917 revolution as a "directive" by means of which that government "dominates and controls" the Communist Party of the United States in the 1950's.

In reaching this conclusion, the Board perverted history as well as logic. The roots of the Communist Party lie deep in American soil, and Marxist thought, activity and organization were indigenous to this country long before the Russian socialist revolution.

The history of socialism in this country begins with the pre-Marxist Utopian socialists (Robert Owen, Charles Fourier, and Etienne Cabet), who in the first half of the

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[64] Cf. *Schneiderman* v. *United States, supra*, in which the Court said (at 154): "Philosophies cannot generally be studied *in vacuo*."

nineteenth century established numerous experimental colonies in the United States (Tr. 15576-77).[65] Marxist socialism appeared in America soon after the publication of the *Manifesto*. The first Communist Club in the United States was founded in New York City in 1857. Its leading figure, Joseph Weydemeyer, a friend and follower of Marx, later served as a high-ranking officer in the Union army during the Civil War, as did several other Marxists. American Marxists helped in the formation of the Republican Party, backed Lincoln's candidacy in 1860, and actively supported the cause of the North in the Civil War. Marx and Engels themselves wrote for American publications, notably the *New York Tribune* of Dana and Greeley. Marxists helped form the National Labor Union, the first national federation of American trade unions, whose president, William H. Sylvis, corresponded with Marx and recognized the validity of his views.[66] American Marxists played a leading role in organizing the American Federation of Labor. They founded the Socialist Labor Party in 1876 and the Socialist Party in 1900. (R. 1262-65, 1270-01.)[67]

The absurdity of the Board's conclusion becomes even more patent in the light of its own characterization of Marxism-Leninism. The Report describes it as an "amorphous amalgam" (R. 42). It says that the "rules" for mak-

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[65] Marx once observed, "Socialism and Communism did not originate in Germany, but in England, France and North America." Karl Marx, *Selected Essays* (N. Y. 1926), p. 140.

[66] Samuel Gompers has described the leading role played by American adherents of the International Workingmen's Association, founded by Marx and Engels, in the early struggles for an eight-hour day in this country. Gompers, *Seventy Years of Life and Labor* (N. Y. 1925), v. 1, pp. 51-60.

[67] The organization of petitioner grew out of a split in the Socialist Party in 1919 when the left wing majority seceded, primarily over the issue of opposing World War I. Factions within the left wing thereupon organized two separate Communist Parties which merged in 1921 (A.G. Exs. 4, 5, 13).

ing Marxism-Leninism effective have "been provided an elasticity which makes them applicable under an endless variety of circumstances," and that the "overall policy of Marxism-Leninism" is to do "what is expedient under the given circumstances" (R. 31, 21). It finds that the "tactical aspects of the theory [of Marxism-Leninism] thus attains a flexibility which would appear to make it mean what the current leaders of the C.P.S.U. want it to mean" (R. 23).

Petitioner rejects these vulgarizations of Communist theory. But the point here is that the Board's own premise, as expressed in the foregoing excerpts, demolishes its conclusion.

If the body of Marxist-Leninist literature is indeed an "amorphous amalgam," it cannot simultaneously be a series of "directives." Nor can the Soviet Union dominate and control petitioner by directives so "elastic" that they are "applicable under an endless variety of circumstances" and come down to an order to do "what is expedient under the given circumstances."

If Marxist-Leninist theory means nothing but what "the current leaders of the C.P.S.U. want it to mean," then obviously Soviet directives cannot be found in the body of permanent or "classical" literature which, according to the Board, is meaningless in the absence of current, shifting interpretation. The directives, if they exist, must reside in current "interpretative" orders of Soviet leaders. But the record is altogether devoid of current evidence of Soviet orders. In fact, it was precisely the absence of such evidence which forced the Board to fall back on its preposterous notion that Marxism-Leninism is *per se* a series of directives.

The opinion below did not discuss the Board's thesis that petitioner's adherence to the principles of Marxism-Leninism *per se* satisfies the directives and policies criterion. However, the court's own conclusion as to the nature of Marxism-Leninism is a further demonstration of the absurdity of that thesis. The court stated (R. 2143):

". . . while the tenets of Marxism-Leninism, forcefully set out in the writings of Marx, Lenin and Stalin, permit a wide flexibility in tactics, that is of intermediate activities and objectives, they admit of no deviation from the ultimate objective, which is a classless, stateless world."

Obviously, a body of doctrine that permits a wide flexibility of intermediate activities and objectives cannot constitute "directives" as to such activities and objectives. The principle that there must be no deviation from the ultimate objective of a classless, stateless world certainly is not a "directive" within the meaning of section 13(e)(1), and still less one from the Soviet Union. Nor can pursuance of that goal supply evidence of an intention to effectuate Soviet policies. The goal of a stateless, classless world has long been advocated by many non-Communists who reject the path taken by the Soviet Union, including contemporary Socialist parties.

Marxism-Leninism Does Not Direct Subservience to the Soviet Union.

Having found that Marxism-Leninism is a series of Soviet directives, the Board proceeded to examine their content. Its findings in this regard, affirmed by the court below without discussion (R. 2147-48), further demonstrate the irrationality of the Board's approach.

The Board found that "a Communist Party which adheres to Marxism-Leninism is, of necessity, under the domination and control of the Soviet Union" (R. 32). The Board "documented" this conclusion by a few fragmentary quotations from Marxist works, the latest of which (Dimitroff's *United Front*) was written in 1935 (R. 31-32).

From these quotations, the Board found that: (1) "the Soviet Union has a specific place in Marxism-Leninism;" (2) "it represents the first victory of the proletariat;" (3) "it is the center of the world proletariat and it is entitled to the allegiance of the proletariat everywhere;" and

(4) "the authority of its Communist Party is international." The Board then concluded that "the *corollary* of this is that a Communist Party which adheres to Marxism-Leninism is, of necessity, under the domination and control of the Soviet Union" (R. 32; emphasis supplied). The Board's corollary, however, has no foundation either in its premises or in the documentation.

The excerpts quoted by the Board are to the effect that the views of the leaders of the Soviet Union are entitled to great respect from all Communists because the Soviet Union was the first country to carry through a socialist revolution. It is in this sense, as the excerpts make plain, that the "authority" of the Communist Party of the Soviet Union is "international." The excerpts do not assert, as the Board states, that the Soviet Union is entitled to the "allegiance" of the world proletariat. What they do say is that the first socialist state, then in its formative period and surrounded by hostile capitalist states, deserves the friendship and support of working people everywhere, and that its survival is fundamentally important to the cause of world peace and democracy, as well as to the eventual establishment of socialism in other lands.

All that the quotations cited by the Board establish is that the Soviet Union occupies much the same position of authority and prestige among Communists that the United States held among republicans in the late eighteenth and early nineteenth centuries. The establishment of the American Republic first demonstrated the practicality of the theories of government expounded by Locke, Rousseau, and other enlightened thinkers of the eighteenth century.[67a] As

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[67a] By the Board's reasoning, the American revolution of 1776 must have been the work of "foreign agents," since Washington, Jefferson, Franklin, Madison, Paine, and other American revolutionary leaders adopted and put into practice the theories of government expounded by Englishmen, Frenchmen, and other Europeans. The Declaration of Independence was, by the Board's logic, a product of foreign directives, for it was Locke and Rousseau who had

a result, the United States had "a specific place" in the revolutionary movements of the period. It became the "center" of the world movement against absolutism. The "authority" of its leaders—Washington, Jefferson, Franklin, Paine, and the rest—was "international." The principles enunciated in the Declaration of Independence and their practical application in the Constitution provided a pattern which was heavily relied on by the republicans of other lands. The United States attracted to itself the support of republicans everywhere who gave practical assistance to its struggle for freedom. Yet it would be absurd to conclude as a "corollary" of these facts, that the leaders of the French and Mexican revolutions were "dominated and controlled" by the United States or operated to effectuate its policies.[68] The Board's conclusion from similar facts relating to the Soviet Union is equally absurd.

Marxism-Leninism Does Not Require the Existence of an International Communist Organization.

The Report asserts that one of the "directives" of the classical Communist writers is advocacy of international revolution "through the instrumentality of an international organization" (R. 25).

It rests this assertion on the finding that "international and revolutionary factors" are basic to Marxism-Leninism

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earlier taught such seditious doctrine as that all men are endowed with inalienable rights to life, liberty and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed, and that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it.

[68] Nevertheless, this charge was made. In 1820, Count Metternich wrote: "These United States * * * have cast blame and scorn on the institutions of Europe most worthy of respect * * * fostering revolutions wherever they show themselves * * * they lend new strength to the apostles of sedition and reanimate the courage of every conspirator." (Quoted by Dexter Perkins in *Hands Off! A History of the Monroe Doctrine.*)

(R. 24). This finding contains an element of validity, in that Marxist-Leninist literature teaches that the economic laws governing social and political development, in accordance with which capitalism supplanted feudalism, will in turn inevitably give rise to the establishment of a socialist society in every country of the world.[69] From this generalization, the Board concluded that "*it is inescapable* that all those working for the ultimate ends of the movement must work in unison and in one cohesive organization on a world-wide basis" (R. 24, emphasis added). The Report does not say why this conclusion is "inescapable" and in fact it is a palpable non-sequitur. The single excerpt the Report quotes to support its conclusion says nothing whatsoever about an international organization (R. 24).

Furthermore, even if the Board's conclusion were logical, it is irrelevant. The relevant inquiry is not what is "inescapable" from the literature, but what has actually taken place. The third and last world organization of Marxist parties, the Third International, concededly dissolved in 1943 (R. 14-15), and, as we have seen, the Board makes no finding that it was succeeded by any other organization.

The Principle of Democratic Centralism Has No Relevance to the Issue of Foreign Control.

The Board found that petitioner's "use of the organizational principle known as 'democratic centralism'" proves that it operates pursuant to Soviet directives and for the purpose of effectuating Soviet policies (R. 56-57).

The Board correctly stated that democratic centralism is a Communist principle of organization which provides for the following: (1) election of all officers and leading committees; (2) free discussion of all policy questions pre-

[69] It is also indisputable that these "international and revolutionary factors" are not the product of Soviet "directives" but were basic to Marxism from its inception. The Report documents its statement as to these factors by references to the Communist Manifesto of 1848 (R. 24).

ceding a majority decision of the appropriate party organizations; (3) acceptance by the minority of majority decisions and their execution by the entire membership (R. 56).

In discussing the petitioner's application of this principle, the Board noted the testimony of petitioner's witnesses that democratic centralism establishes procedures under which control of the organization is vested in its members. It then cited the testimony of three of the Attorney General's witnesses to the effect that petitioner is ruled "from the top down and not from the bottom up" (R. 56-57). That testimony, even it were true, is beside the point. The relevant question is not in what direction authority runs, but whether the "top" is domestic or foreign.

The Board found that the "top" was foreign prior to 1940 on the ground that during the period of petitioner's affiliation to the Communist International, democratic centralism obliged it to accept decisions arrived at by that organization. However, the petitioner disaffiliated from the Communist International in 1940, and the latter dissolved in 1943. Subsequent to 1943, therefore, there was no international organization within which democratic centralism could operate. Faced with a complete absence of any evidence of international affiliation of petitioner after 1940, as a possible source of foreign "directives" through the operation of democratic centralism, the Board took refuge in a fiat. It stated that in view of petitioner's former affiliation with the Communist International, "it is reasonable to conclude, and we do so, that [petitioner's] continued following of the principle of democratic centralism keeps [petitioner] within the authority of the Soviet Union" (R. 57). This conclusion is not only wildly illogical, but also contrary to the uncontradicted evidence.

Petitioner's constitution provides that its national convention, a delegated body elected by the membership, is its highest governing body, and that, in the interval between

conventions, this authority vests in its national committee, elected by the convention (A.G. Ex. 374; R. 1698-1704). Petitioner's witness Gates testified that petitioner is a self-governing organization which applies democratic centralism as its internal principle of organization (R. 1204-5, 1224). The Attorney General's witness Lautner corroborated this testimony, stating that democratic centralism "pertains to rules and regulations by which the Communist Party *governs itself*" (R. 965, emphasis added).[70] There is no evidence to the contrary.[71]

Petitioner's Views on Imperialism and Its Programs with Respect to Labor, the Negro People and Youth Have No Relevance to the "Directives and Policies" Test.

The Report discusses at great length petitioner's views on imperialism and its emphasis on programs to advance the interests and win the adherence, of workers, the Negro people, and youth (R. 44-56, 64-78). On the premise that Marxism-Leninism is a series of orders from the Soviet Union, the Board concluded that the fact that petitioner's views and activities in these fields are based on Marxist-Leninist principles proves that petitioner complies with Soviet directives within the meaning of section 13(e)(1) (R. 64). The premise being fallacious, the conclusion falls. All that the Board's discussion of these programs demonstrates is that they represent an application of Communist principles. Thus the Board again relied upon its fallacious version of the "non-deviation" criterion (see *infra*, p. 137) to support its findings on "directives and policies."

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[70] The Board's description of Lautner's testimony in footnote 26 of the Report (R. 28) is a complete invention, as can be seen by examining the testimony which the Board's Annotated Report cites. See R. 1854, ftn. 1, and R. 973-974.

[71] The Board's inference of foreign control from petitioner's practice of the principle of self-criticism (i.e., that a political party should openly acknowledge, discuss, and correct its mistakes) is likewise unsupported by evidence or reason. This is apparent from the face of the Report (R. 57-58).

The Report also finds that petitioner's views and activities in these fields were formulated and performed for the purpose of effectuating Soviet policies, within the meaning of section 13(e)(1). This finding is based solely on the content of these views and activities. It is clear, however, that their content establishes nothing of the sort.

The first view to which the Report refers is that the United States is an imperialist country[72] (R. 44). The Board's thesis is that the concept of imperialism, and particularly the view that the United States is an imperialist power, is a view which can be attributed only to Soviet origin. As literate persons are aware, however, the concept of imperialism and the characterization of the United States since the turn of the century as an imperialist country are neither Marxist-Leninist inventions nor imports from abroad. Lenin started his book "Imperialism, the Highest Stage of Capitalism," by acknowledging his indebtedness to the book, "Imperialism," written in 1902 by the "bourgeois" English economist, J. A. Hobson (A.G. Ex. 140, p. 15). Almost a quarter of a century before the Russian revolution, distinguished non-Marxist Americans organized the Anti-Imperialist League in opposition to the Spanish-American war, the conquest of Cuba, and the annexation of the Philippines (Tr. 15705). And if critiques of American imperialism are the product of Soviet "directives" then

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[72] The Report nowhere states what Communists mean by imperialism, except to make the egregious error (R. 45) of saying that Lenin "designates capitalism as 'imperialism'." The record is replete with oral and documentary testimony on the meaning of the term "imperialism." The term refers to the "highest" stage of capitalism, with characteristics which distinguish it from earlier stages. See, for example, Lenin's *Imperialism* (A.G. Ex. 140, particularly pp. 88-89, and R. 1521-2, where imperialism is defined) and the testimony of Dr. Herbert Aptheker, R. 1273-4. Had the Board paid any attention to this evidence, it might at least have avoided the error of stating that "all countries other than those of a victorious socialist revolution—which encompasses only the Soviet Union and those brought within its orbit—are chacterized as 'imperialist' * * * " (R. 45-6).

some of America's foremost historians and political scientists are foreign agents.[73]

Associated with its discussion of imperialism is the Board's treatment of the concept of just and unjust wars. As the Report states, Communists hold that a war to liberate an oppressed people from the yoke of imperialism is just and should be supported while a war to conquer or enslave others is unjust and should be opposed (R. 25). This concept, too, is neither a Russian invention nor unique to Communists. Indeed, the Record shows that petitioner's teaching on this question was drawn not only from Marxist sources, but from the precepts and conduct of men like Lincoln and Grant (who opposed the Mexican War of 1848), Mark Twain and Carl Schurz (who opposed the Spanish American War), Eugene V. Debs and Robert LaFollette, Sr. (who opposed World War I); and from the charter establishing the Nuremberg War Crimes Tribunal, which denounces aggressive war as criminal and abolishes the defense of superior orders (R. 1239-41).[74]

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[73] Including Charles A. and Mary R. Beard, Parker T. Moon, David S. Muzzey, John A. Krout, Ray Allen Billington, B. J. Loewenberg, and S. A. Brockunier (Tr. 13560-62). Defenders of American imperialism also recognize the accuracy of this characterization. Thus, Dr. Virgil Jordan, President of the National Industrial Conference Board, in an address delivered before the 1940 annual convention of the Investment Bankers Association, had this to say on the subject: "Southward in our hemisphere and westward in the Pacific, the path of empire takes its way, and in modern terms of economic power as well as political prestige, the sceptre passes to the United States. We may be afraid of the unfamiliar term imperialism in connection with the commitment we have made. We may prefer in the current American fashion to disguise it in a vague phrase like 'hemisphere defense,' but consciously or unawarely America has been destined to that career by its temperament, capacity and resources and by the drift of world events, not merely in recent years, but since the beginning of the century and certainly since the last war" (Tr. 15665).

[74] In a speech before the Sixth International Congress on Penal Law, Pope Pius XII declared that "unjust war is to be accounted one of the very gravest crimes that international law must proscribe, and the authors of it are in every case guilty and liable to punishment that has been agreed upon." *N. Y. Times,* October 4, 1953, p. 1.

The Board also purported to find evidence of the advancement of Soviet objectives in the fact that since 1945 petitioner has emphasized peace as the central and most urgent issue facing the American people and has criticized the American cold-war policy as aggressive (R. 52-55, 48). Thus the Board equated loyalty to the United States and freedom from Soviet control with unconditional support of the cold war. Moreover, the Board ignored the uncontradicted evidence of the independent origin of petitioner's position on international questions.

Petitioner's position since 1945 has been based on the analysis contained in its July 1945 convention resolution (A. G. Ex. 210). In accordance with that analysis, petitioner has opposed cold war policies of the national administration as a threat to peace. It has consistently urged a return to the successful World War II policy of U. S.-Soviet cooperation and the settlement of disputes among nations by peaceful negotiation. Petitioner has been guided by the conviction that World War III is not inevitable and that peaceful co-existence of the capitalist and socialist systems is possible on the basis of mutually beneficial diplomatic, trade and cultural relations and peaceful competition. It has supported the proposals of non-Communist individuals and governments which it believed to be in the interests of peace. (A. G. Ex. 210, pp. 819-820; A. G. Ex. 378, p. 7; C. P. Ex. 55, p. 31; Tr. 14807-14808, 14811-14816). Even the Attorney General's witness Lautner, in testimony quoted in the Report (R. 52), stated that petitioner's 1945 analysis preceded a comparable analysis by the Soviet Union.[75]

The Board also saw evidence of a purpose to promote Soviet policies in the fact that petitioner attaches major importance to programs and activities in behalf of Ameri-

[75] No discussion is required of the Board's fatuous finding that the concept that the world is divided into two camps is a Soviet "pattern" (R. 48). The same "pattern" has furnished the basis for official American policy since 1945.

can workers, the Negro people, and young people (R. 64-78). The record is clear, and the Report acknowledges, that the petitioner has worked assiduously to promote what most people consider desirable reforms in American life—such as strengthening of the trade union movement, the enactment of social security and other welfare legislation, the elimination of discrimination against the Negro people, etc. (R. 77).

Obviously, however, it is nonsense to infer foreign control from the fact that a political party works among, and seeks to attract the adherence of, major groups of our population. By such a test, every American political party would stand condemned as a "foreign agent."

It is equally nonsensical to infer advancement of Soviet objectives from activities designed to achieve social reforms which many non-Communists likewise believe in and work for. The Board arrived at this startling result by stating that petitioner has a bad motive in carrying out its good work. It said that petitioner's "trade union work, youth work, and national minorities work *could only* have as their aim the effectuation of the policies of the Soviet Union with respect to the world Communist movement" (R. 78, emphasis added). Thus petitioner is condemned because the Board thinks that work for social betterment must be inspired by ulterior motives.[76]

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[76] By this logic, trade unions and religious and cultural organizations which work for similar objectives "could only have as their aim the effectuation of the policies" of Communists, and are therefore to be condemned as Communist-front or Communist-infiltrated organizations. The Attorney General has applied this logic in petitions against alleged Communist-front organizations. The following is a typical allegation of such a petition: "The Committee supported the views, policies and objectives of the Communist Party by opposing the enactment of certain legislation regarded by the Party as inimical to its interests such as the Mundt-Nixon bill, the Hobbs bill, and the Internal Security Act of 1950." Paragraph III(4)(c) of Amended Petition in *Brownell* v. *American Committee for Protection of Foreign Born*, Docket No. 109-53, Subversive Activities Control Board.

The real basis for the Board's order, therefore, becomes apparent. Petitioner is held to be a seditious foreign agent because it opposes those governmental policies which it believes threaten peace, weaken the trade union movement, perpetuate racial discrimination, undermine the living standards of the people, and infringe civil liberties. Petitioner is condemned by its political opponents on the basis of their hostility to its views. Thus the Board obediently fulfills the purpose of the Act to suppress political opposition under the pretext of protecting the national security.

2. *The "Non-Deviation" Criterion.*

As the Report states (R. 80), the Attorney General's evidence on "non-deviation" consisted primarily of the testimony of his "expert" witness, Mosely. The Board's conclusions likewise rest on this testimony.[77]

On direct examination, Mosely testified that the Communist Party and the Soviet Union held similar or "parallel" views on each of 44 different issues dealing exclusively with international relations and foreign affairs, and ranging in time and subject from the League of Nations in 1919 to the Korean War in 1950. With respect to each issue, he identified documents which purportedly "illustrated" the asserted similarity or parallelism. All of these documents were received in evidence (R. 80).

The Mosely testimony and exhibits had no tendency, however, to prove "non-deviation" within the meaning of section 13(e)(2), and had no rational relation to the 3(3) definition of a Communist-action organization. In relying on this evidence, the Board and the court below violated section 13(e) and compounded the unconstitutionality of that section on its face, in four respects: (1) They

[77] This is evident from the Report (R. 79-86) and was acknowledged by the court below (R. 2145).

rejected consideration of the date sequence of the views of the petitioner and the Soviet Union, respectively. (2) They excluded proof of the truth, reasonableness, or general acceptance of the views. (3) They relied on views which they conceded could well advance the best interests of the United States. (4) They excluded proof that the petitioner arrived at its views independently.

The Date-Sequence Error

Mosely at no time testified that petitioner's views on the 44 issues to which he addressed himself did not "deviate" from those of the Soviet Union. Instead, he stated that the views of each were "parallel," or "similar."

The Act, however, requires proof of "non-deviation." A parallelism or similarity of views is something quite different from "non-deviation." The dictionary definition of "deviation" is "variation from the common way, from an established standard, position, etc."[78] Accordingly, deviation or non-deviation cannot occur unless there is a *pre-existing* "established standard, position, etc." from which it is possible to deviate.

Applying this definition to section 13(e)(2), non-deviation can be proved only by showing, (1) that the Soviet Union *first* established a position on a given issue; and (2) that, *thereafter*, petitioner, knowing of the Soviet position, did not "deviate" from it, but expressed a similar view or policy on the given issue.

Any contrary construction of section 13(e)(2) leads to an absurd result. A parallelism of ideas can have no conceivable relation to the issue of foreign control unless it appears that the alleged domestic agent adopted ideas *previously* enunciated by its alleged foreign principal. It is impossible to infer foreign "domination and control"

[78] Webster's New International Dictionary.

from a showing that the alleged domestic agent adopted its views in advance of the adoption of similar views by its alleged foreign principal.

Yet the indispensable element of chronological sequence is absent from the record. At no time did the Attorney General offer any evidence that the Soviet view on a subject dealt with by Mosely was adopted, much less communicated, prior to petitioner's adoption of a view on the same subject. On the contrary, the Attorney General took the position that he was not required by the Act to show, and would make no attempt to show, that the Soviet view antedated the petitioner's view (R. 81-82, 836; Tr. 10934-10935). Although relying on the foreign and domestic exhibits offered through Mosely to illustrate views of the Soviet Union and the petitioner on particular subjects, the Attorney General expressly disclaimed the materiality of their date sequences. As the Report points out, the Attorney General insisted that these exhibits were selected for their content alone, and were not intended to establish priority of the Soviet view (R. 81-82).[79] The Attorney General resisted petitioner's attempt to show that its views on particular questions were advanced before the Soviet Union had spoken on the same question. He admitted, inter alia (R. 836):

> "As I am saying, we have not made any attempt to show how the Communist Party reached the views that it did. All we are attempting to show is that it reached the view."

Accordingly, even if the Mosely testimony is accepted in its entirety, it establishes no more than the bare fact that the petitioner and the Soviet Union have held similar views on a number of international questions. There is nothing in his testimony on which to predicate a finding that the petitioner did not "deviate" from Soviet policies. Nor

[79] This disclaimer was necessary because it appears from the face of the exhibits that in 28 out of the 44 issues dealt with by Mosely, the domestic exhibits antedated the foreign exhibits. See Tr. 10903.

did the Board make any determination of the date sequence of the views in question independently of Mosely's testimony. Instead, it relied on all of the examples testified to by Mosely indiscriminately. It did so despite the uncontradicted testimony of petitioner's witness, Gates, that petitioner has often taken positions in advance of the Soviet Union and has taken positions on many questions as to which the Soviet Union has never expressed a view (R. 1227).

In affirming the finding of the Board, the court below dismissed petitioner's contention that consideration of the date sequence of the views was required by the terms of section 13(e)(2) with the statement (R. 2146) that, "The statutory phrase refers to identity or coincidence and not to chronological adoption." Accordingly, both the Board and the court below misconstrued section 13(e)(2) by substituting similarity of views for "non-deviation."

The Error of Disregarding the Truth, Reasonableness and General Acceptance of the Views.

If the "non-deviation" criterion is to have any possible relevance in establishing that a domestic organization is the agent of a foreign principal and operates to advance the policies of the latter, the application of the criterion must be confined to views and policies which are peculiarly characteristic of the alleged principal. For example, it would be absurd to infer from proof that two organizations oppose racial discrimination and segregation that one is "dominated or controlled" by the other or operates "to advance the objectives of the other." Yet the Board and the court below relied on views of this character in concluding that the evidence satisfied the "non-deviation" criterion.

The hearing panel precluded petitioner from proving that the views involved in Mosely's testimony were true, reasonable, or generally accepted by individuals and groups (including, in some instances, the United States government)

concededly not under Soviet control or engaged in promoting Soviet policies.[80] The Board affirmed this ruling (R. 80), concurring in the position taken by the Attorney General (Tr. 8878) that "it does not matter whether the Soviet view on these issues which were raised were [sic] right or wrong, or whether the Soviet view was held by many people, by some people, or by all the people." The court below affirmed the finding of the Board on "non-deviation" without discussion of this question (R. 2146, 2148).

This application of the non-deviation criterion predicated the finding that petitioner is a seditious, foreign-controlled organization in part upon such entirely legitimate and widely held views as advocacy of negotiations for a cease-fire in Korea, advocacy of the seating of the Peoples Republic of China in the U. N., and the belief that the Syngman Rhee regime was a corrupt dictatorship (R. 83-84). It is plain that so applied the non-deviation test is wholly irrational.

The Error of Relying on Views Which May Promote the Welfare of the United States.

The Attorney General did not contend that any of the views testified to by Mosely were dangerous, seditious or opposed to the national interests of the United States, but took the position that that question was "wholly irrelevant" (Tr. 9059). The hearing panel, in rulings affirmed by the

[80] For example, these rulings were applied to the following views, among others: that there should be negotiations for a cease-fire in Korea (R. 864); that the Chiang Kai-shek regime was a corrupt dictatorship (R. 836-7); that the establishment of a second front in World War II was desirable (R. 844-5); that the League of Nations as originally organized promoted imperialist purposes (R. 839; Tr. 9063); that the defendants in the 1937 Soviet treason trials were guilty as charged (R. 840); that Oatis' confession of espionage was true (R. 845); that the Syngman Rhee government was a corrupt police state (R. 862-4). Citations are to exclusions on cross-examination. For renewal of the exclusionary rulings to prevent the proof in petitioner's affirmative case, see R. 1274-5.

Board (R. 81), precluded petitioner from establishing that views testified to by Mosely were calculated to promote the peace and well-being of the United States,[81] and even from showing that some of these views became the official policy of our government.[82] Nevertheless, the Board relied on these views to support its finding under the "objectives" component of the section 3(3) definition that petitioner operates to promote the seditious objectives attributed to the world Communist movement by section 2 (R. 80-86). The irrationality of this application of section 13(e)(2) is clear.

The opinion below did not discuss this aspect of the Board's application of the "non-deviation" criteron. It replied to petitioner's contention that there is no rational relation between this criterion and the "objectives" component of the section 3(3) definition, by holding that section 13(e)(2) is addressed solely to the "domination and control" component of the definition (R. 2122). This being the case, the court was obliged to reverse the Board's order. For on the court's own premise, the Board plainly erred in using its finding on non-deviation to support its ultimate finding on the "objectives" component.

The Error of Disregarding the Independent Origin of the Views.

At most, "non-deviation" supplies tenuous circumstantial evidence of the "domination and control" element of the section 3(3) definition. The fact that two people or organizations hold similar views in a particular field of thought may, and usually does, have nothing to do with domination by one over the other. The similarity may arise from the voluntary acceptance by each of a common premise. Thus all pacifists will oppose a particular war.

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[81] E.g., R. 839, 844, 861, 864.

[82] E.g., desirability of a second front in World War II and of negotiating a cease-fire in Korea (R. 844-45, 864).

The hearing panel, however, precluded petitioner from proving that the similarities of views of petitioner and the Soviet Union on various international questions were attributable to the independent application by each of the premises and analytical approach supplied by Marxist principles.[83]

The Board affirmed the panel's rulings on this as on all other matters affecting the Mosely testimony (R. 80). Nevertheless, it then proceeded to reject petitioner's contention that similarities between views of petitioner and those of the Soviet Union and Communists of other lands are attributable to the independent application by each of Marxist-Leninist principles. It did so on the ground that "the great weight of the evidence is to the contrary" (R. 86).

The Board failed to state what this evidence was, and in fact there is none.[84] Worse, it concealed the fact that any lack of evidence by petitioner on this issue was the result of the panel ruling, affirmed by the Board, excluding proof on the subject. Moreover, Mosely testified that he was unable to conclude from the similarities of the views of petitioner and the Soviet Union that the former had not arrived at its views independently. He regarded the exhibits introduced through him only as evidence of the views and reasoning expressed therein, "but not of the thought proc-

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[83] For example, petitioner's counsel asked Mosely whether petitioner's opposition to World War II at the time of its outbreak in 1939 was not based on Marxist concepts as to the cause and nature of wars and the distinction between just and unjust wars. Counsel for the Attorney General objected to the question as irrelevant, stating: "It does not make any difference how they arrived at the view as to the war" (R. 842). In the colloquy that followed, counsel for the petitioner addressed the following question to the panel chairman and received the following reply (R. 843): "Mr. Marcantonio: * * * In other words how [petitioner] came about reaching certain decisions and taking certain public positions on various issues is irrelevant? Mr. Brown: Yes, sir."

[84] The Board's annotation of its Report to the record gives no citations to document this conclusion (R. 1959).

esses or political processes by which one or the other arrived at the position which he stated" (R. 837-38). The Board, however, brushed aside the expert's evaluation of his own testimony (R. 81).

The Board also brushed aside (R. 85) the uncontradicted testimony of petitioner's witnesses that petitioner formulated and arrived at its views independently. It ignored the testimony of petitioner's witness, Gates (R. 1225-26), that petitioner's frequent agreement with Soviet views on international questions resulted from its own independent analysis of the situation from a Marxist point of view and its conclusion that the Soviet position was in the interest of world peace and hence in the interest of the American people.

The court below, in sustaining the finding of the Board on "non-deviation," stated (R. 2146) that it was petitioner's position that "the identity of views of the Soviet Union and the Party is a coincidence." As we have seen, however, that was not petitioner's contention nor was it the testimony of its witnesses. The court failed to answer the contention which we did make. Like the Board, it held that the similarity of some of petitioner's views to those of the Soviet Union was per se evidence of domination and control. It also disregarded the uncontradicted testimony that petitioner arrived at its views independently, as well as our contention that the panel and the Board erred in precluding cross-examination of Mosely designed to show the independent origin of petitioner's views.

3. *The "Financial Aid" Criterion.*

The Report shows on its face that the Board misapplied the "financial aid" criterion in making a finding adverse to petitioner under section 13(e)(3).

a. The Board did not and could not find that petitioner "receives" foreign financial or other aid, as required by

section 13(e)(3). All that it found (R. 86-88) was that there were instances in which petitioner received such aid in the past, all prior to the date of the Act.[85]

b. The Board did not find, and could not find, that the donor attached conditions to the alleged past financial aid. Accordingly, the alleged aid provides no rational basis for inferring even past domination or control (see *supra*, p. 49).

On the face of the Report, petitioner was entitled to a finding that it does not receive foreign financial aid. The Board made no such finding. Instead, it concluded that its findings of past financial aid "are relevant to the ultimate issue in this proceeding in the light of the whole record" (R. 89). The brief of the Board in the court below stated (p. 101): "It is of course evident from this finding that the Board could not have based great reliance thereon in reaching its ultimate conclusion." Be that as it may, the Board did support its ultimate conclusion, in part, upon its finding on "financial aid," and its action was affirmed by the court below (R. 2148). This was plainly error since the Board's own version of the evidence required a finding in petitioner's favor. The Act prohibits the issuance of a registration order on the basis of conduct which an accused organization discontinued prior to the enactment of the Act (*infra*, p. 160).

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[85] The only instance claimed by the Board subsequent to 1940 is the asserted receipt in 1949 by International Publishers of some Soviet book plates and English translations of books (R. 88). This assertion is based on the Board's misrepresentation of testimony by Harvey Matusow, subsequently acknowledged by him to be false (*infra*, pp. 207-08). Moreover, the Board found that International Publishers is "a Soviet Union publishing organization" (R. 87). If that be true, the alleged 1949 transaction was between two Soviet agencies and not a contribution of financial aid to petitioner. We also later show (*infra*, pp. 208-09) that the Board's findings on financial aid in 1940 and earlier years were based on testimony proven to be false.

4. *The "Instruction and Training" Criterion.*

The Board found that "there is no substantial evidence of record showing training of [petitioner's] members in the Soviet Union subsequent to the outbreak of World War II" (R. 92).[86]

On the Board's own statement of the evidence, therefore, petitioner was clearly entitled to a finding under section 13(e)(4) that it does not send any members or representatives to any foreign country for instruction or training. But as in the case of "financial aid," the Board refused to favor petitioner with the negative finding that the record compels. Instead, it indulged in vaporous speculation as to why petitioner had not engaged in this practice for the preceding seventeen years (R. 92-93). It then proceeded, in violation of section 13(e)(4), to base its order, in part, upon a practice that concededly was abandoned fourteen years prior to the enactment of the Act (R. 93). The court below affirmed this action of the Board without discussion (R. 2148-49).

5. *The "Reporting" Criterion.*

The Board found under section 13(e)(5) that on a number of occasions prior to petitioner's disaffiliation from the Communist International representatives of petitioner made reports on its activities to various bodies of that organization (R. 93-4). The last occasion on which it found such "reporting" was 1935 (R. 93).

The only subsequent "reporting" found by the Board rests on its absurd treatment of a few incidents, all of which occurred prior to the date of the Act.

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[86] In fact, as the Report shows on its face, there is no evidence whatsoever of any study abroad by petitioner's members subsequent to 1936 (R. 90).

a. The Board found that "it is reasonable to conclude" that petitioner "has reported more recently [than 1940] to the Soviet Union." This finding was based exclusively on testimony of Harvey Matusow (R. 94). Matusow testified that one Lou Diskin had said that in 1949, after attending a World Youth Festival of the World Federation of Democratic Youth in Budapest, he stayed on "to deliver some reports on the American youth movement to that group, to the Cominform representatives" (R. 1032). It is clear from the Board's own statement of this hearsay testimony that even if true it has no relevancy to prove the "reporting" standard. For there was no evidence that Diskin (a) reported on behalf or at the request of petitioner; (b) reported the views or activities of petitioner; (c) reported anything more than his personal views and observations on the subject of American youth; or (d) used the word "reports" in his alleged account in the sense of a communication which a subordinate makes to a superior.[87] There was, therefore, no basis from which the Board could "reasonably conclude" that petitioner reported to the Soviet Union in 1949. Moreover, the Board itself subsequently held in another proceeding that no finding can stand on testimony of the notorious and admitted perjurer Matusow (*infra*, p. 213).

b. The Report (R. 95) alludes to the fact that Elizabeth Gurley Flynn, a member of petitioner's National Committee, visited France in 1945, 1949, and 1950, where, as she testified, she met Communists from other countries and in the course of conversation naturally exchanged experiences (R. 1277-82, 1298).[88] The Board did not find that

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[87] In addition, of course, there is nothing to suggest that the alleged recipients of the "report" used it as an instrument of control over petitioner (see *supra*, p. 50).

[88] The Report emphasizes the fact that during her 1945 trip to France, Miss Flynn even met Communists from the Soviet Union (R. 95). It ignores her uncontradicted testimony that these Russians

these conversations were "reports." But it used these trips as a basis for its findings on reporting and concealed the uncontradicted testimony of Miss Flynn that she did not report to anyone (R. 1282).

c. The Report asserts that "by means unknown, contents of an important letter written by William Z. Foster concerning [petitioner's] affairs were communicated to Jacques Duclos, General Secretary of the Communist Party in France and a former member of the Executive Committee of the Communist International" (R. 95).[89]

The Report does not specifically describe the Foster letter as a "report" to a foreign principal, but it insinuates as much. However, the undisputed evidence established that it could not conceivably have been a "report" within the meaning of the Act. The letter was addressed to petitioner's National Committee. There was no evidence whatsoever that petitioner or Foster sent it to Duclos or intended that it should be brought to Duclos' attention. Moreover, the letter was a statement by Foster of his personal dissent from petitioner's policies (see A. G. Ex. 208), not a "report" by or on behalf of petitioner.

d. The Report asserts that petitioner "reported" to the Soviet Union by means of greetings which it sent to organizations and individuals on anniversary occasions (R. 95).

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were all delegates to an international gathering of women and that Miss Flynn's conversation with them concerned child care, post-war reconstruction, and the rights of women (R. 1298). The Report's discussion of Miss Flynn's trips distorts her testimony in other respects as well, particularly by giving the false impression that she made the trips in order to hold the conversations referred to. In fact, the conversations were casual, incidental episodes which occurred during trips made by Miss Flynn as a newspaper correspondent or to attend conventions or affairs (R. 1277-82, 1298).

[89] The Report fixes no date for this communication. Since the Foster letter was referred to by Duclos in an article published in April, 1945 (A.G. Ex. 208), it is evident that the contents of that letter were known to him prior to that time.

The only such greeting cited by the Report during the last quarter of a century is a telegram addressed to Joseph Stalin on the occasion of his seventieth birthday in 1949 and released for publication. This telegram reiterated petitioner's well-known and widely publicized opposition to the Truman foreign policy, expressed confidence that the American people would prevent the outbreak of a new war and achieve an American-Soviet pact of peace and friendship, and wished a long life to Stalin and to his contributions to peace, democracy and socialism (R. 97). In an effort to torture some sinister significance out of this incident the Report states that "it is reasonable to conclude" that the language of the telegram was "possessed of veiled content" (R. 98). Just why the conclusion was reasonable, what this "veiled content" was, and what information it "reported" that was not already well known through petitioner's repeated public statements, the Report does not bother to state.

It is apparent from the foregoing that the Board cited no evidence whatsoever that at least since 1935 petitioner has "reported" within any rational meaning of section 13(e)(5). Nor did the Board find the "extent to which" petitioner reported, as it was required to do so by that section. Much less did it cite any evidence that what it irrationally designated as "reports" were used by the Soviet Union to establish or assert "direction, domination or control" over petitioner.

Finally, even under the Board's nonsensical concept of "reports," it cited none subsequent to 1949, one year prior to the date of the Act. Clearly, even on the Board's erroneous application of the Act's irrational premises, petitioner was entitled to a favorable finding under section 13(a)(5). Yet, abandoning all pretense of reliance on fact, law or logic, the Board concluded that petitioner "reports to the Soviet Union and its representatives" (R. 98).

The court below struck this finding on the ground that the evidence did not support a finding of "constant, sys-

tematic reporting as of now" (R. 2149). The court stated, however (*ibid.*):

> "The evidence indicates instances [of reporting], as in the cases of Eisler and Peters. . . . There is a preponderance of evidence, we think, to support a conclusion that upon occasion leaders of the Party report to representatives of the Soviet Union."

The court's statement, however, is wholly lacking in evidentiary support. As to Peters, there was no evidence that he was ever a representative of the Communist International or the Soviet Union. The Board conceded in its brief below that its contrary finding is inaccurate (see *infra*, p. 209). As to Eisler, there was no evidence that he was a representative of the Communist International after 1936 (see *ibid.*). Moreover, as the Report states (pp. 60-61), both Peters and Eisler left the United States in 1949 so that in no event could their activities in this country provide the basis for a finding of even occasional reporting "as of now"—i.e., subsequent to the date of the Act. The court below did not indicate what other "cases" it had in mind as supplying evidence of current occasional reporting. In fact, however, there are none in the record, and as we have seen, the Report cites none.

6. *The "Discipline" Criterion.*

In applying section 13(a)(6), the Report first quotes statements from a number of American and foreign Communists to establish the proposition (which petitioner itself asserts) that the petitioner, like the Communist Parties of other countries, places great emphasis on the need for internal unity and discipline, demands adherence to party decisions, and condemns factionalism and opportunism among its members (R. 100-01). Obviously, however, petitioner's practice of internal discipline furnishes no evidence that it or its members are under foreign discipline. In an effort to show otherwise, the Report refers back to its

discussion of democratic centralism under the "directives and policies test" (R. 99, 103-04). But as we have shown (*supra*, pp. 130-32), the Board's own analysis of democratic centralism supplied no evidence of foreign directives or discipline. Indeed, in that prior discussion, the Report makes a forward reference to its findings on "discipline" to support its claim that democratic centralism involves foreign directives (R. 57). Thus the Board used the absence of evidence under either test to support adverse findings under both.

Essentially, the Board found that petitioner and its members are subject to foreign discipline because it and other Communist Parties believe that members of a political party should be held to strict adherence to party decisions. Thus the Board assimilated the "discipline" criterion to its erroneous concept of "non-deviation."

The Board also treated what it called "specific instances of record" in which, in its view, the Soviet Union has exercised disciplinary power.

1. The Report cites four occasions on which members of petitioner were allegedly expelled or otherwise disciplined on the initiative of the Communist International during the period of petitioner's affiliation with that organization (R. 102). The most recent of these occurred in 1934.

2. The Report states that in the early 1930's, several of petitioner's members performed missions in foreign countries on behalf of the Communist International (R. 104).

3. It cites a statement by William Z. Foster, petitioner's chairman, that he would have faced expulsion had he conducted a minority factional fight against the policies initiated by Earl Browder and approved by the Party when it dissolved and formed the Communist Political Association in 1944. It then states that after the Foster position prevailed and the Party was reconstituted at a 1945 con-

vention, Browder was expelled for conducting a factional fight against the convention decision (R. 103). These matters were clearly instances of internal discipline. The Report seems to hint that Foster's apprehensions in 1944 and the expulsion of Browder for factionalism in 1945 were inspired by the Soviet Union. But it refers to no evidence to that effect, and there is none.

4. The Report cites petitioner's expulsion of three members, one in 1940 for opportunism (R. 102), one in 1950 for being a police spy (R. 103), and one in 1951 for urging others to distribute anti-Soviet leaflets (R. 103). The Report does not suggest that the Soviet Union had anything whatsoever to do with any of these cases of internal discipline, and no such suggestion could be supported by the record.

5. The Report alludes to the stringent criticism of the Titoist regime in Yugoslavia by the Communist Information Bureau and states that petitioner agreed with this criticism (R. 103).

The alleged incidents which occurred during petitioner's membership in the Communist International sixteen or more years prior to the Act, the more recent scattered instances of internal discipline, and petitioner's agreement with the condemnation of Tito, cannot conceivably support the Board's finding that petitioner and its members are subject to Soviet discipline. Instead, the testimony of petitioner's witnesses that its leaders and members are not subject to and do not recognize the disciplinary power of any foreign government or organization (R. 1223-24) was uncontradicted.

The court below sustained the finding of the Board under section 13(e)(6) (R. 2149-50). Yet plainly, on the Board's own showing, petitioner was entitled to a favorable finding under the "discipline" criterion.

7. The "Secret Practices" Criterion.

As we have seen, section 13(e)(7) makes relevant the use of "secret practices" only if their purpose is either to conceal foreign control or to promote the objectives of the organization (*supra*, p. 51).

Eleven pages of the Report (R. 105-16) are devoted to examples of "secret practices," most of which have to do with precautions against the disclosure of the identity of petitioner's members. The existence of such precautionary practices was conceded in the answer and testified to by petitioner's witness Gates (R. 181; 1216-23).

The final two pages of this section of the Report are captioned "Purpose of Secret Practices" (R. 116-117), and are presumably devoted to a discussion of this essential element of the proof. Most of this text, however, consists of a reiteration of examples of "secret practices" previously noted. The Board did not and could not cite evidence that these practices were engaged in for the purpose of concealing foreign control or promoting petitioner's objectives.

On the contrary, the uncontradicted evidence negatives the existence of the two prescribed purposes. As the record shows and the Report concedes, the petitioner's testimony was that precautionary practices were employed to safeguard its members against economic, social and physical persecution and to protect them from unjust prosecution and snooping by police agents and informers (R. 116, 1216-23). In this respect, petitioner's practices are identical with those employed by trade unions when necessary to safeguard their members from similar persecution (R. 1220-21). The Attorney General's evidence did not contradict, but largely corroborated, this testimony.[90]

[90] The Attorney General's witness Lautner testified that petitioner's alleged preparations to set up an "underground" organization were made so that if it was outlawed as a political party it could,

Nevertheless, the Board found that petitioner's precautionary practices were engaged in for the purposes described in section 13(e)(7) on the ground that this conclusion "is inevitable when the secret practices are examined in the light of the whole record and all the surrounding circumstances under which they were and are performed" (R. 116). Clearly this conclusion was unfounded.

The court below held that the Board's finding as to the purpose of petitioner's practices was not supported by a preponderance of the evidence (R. 2151). The existence of the described purposes is an essential element of the "secret practices" criterion of section 13(e)(7). Accordingly, the holding of the court below invalidated the Board's entire finding under that criterion.

8. *The "Allegiance" Criterion.*

The Board's finding under section 13(e)(8) rested on four premises.

(a) The first of these was that petitioner advocates the violent overthrow of the United States government (R. 127).[91]

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nonetheless, continue carrying on "propaganda work, leaflet production and stuff like that," fight its way back to legality, and regain its constitutional status as a legal party (R. 919). The Attorney General's witness Matusow testified that caution in the use of telephones and other similar practices were adopted to safeguard against illegal wire-tapping and surveillance by the F.B.I. (R. 1025-6).

[91] This theory was an afterthought of the Board's, not shared by the Attorney General, who did not plead it in his petition or offer a proposed finding thereon. Moreover, in urging the admissibility of evidence as to the alleged advocacy of "force and violence," counsel for the Attorney General argued that it was relevant to the findings of section 2, and not to the allegiance test (e.g., Tr. 4153). The Board recognized that its theory was not shared by the Attorney General. For it said that "the evidence in the record which pertains to allegiance is broader in scope than [the Attorney General's] specific allegations" (R. 118). The Board's reliance on a matter not pleaded in the petition violated section 13(a), which provides that the Attorney General's petition shall state under verification

The Board derived this conclusion primarily from excerpts from the *Communist Manifesto* and the writings of Lenin and Stalin (R. 118-123). The finding thus flies in the face of *Schneiderman* v. *United States*, *supra*, in which the Court concluded, after a study of the same texts cited by the Board, that adherence to Marxism-Leninism is not inconsistent with attachment to the principles of the Constitution and being well-disposed toward the good order and happiness of the United States.

The Board also attempted to support its conclusion by reference to the testimony of a number of the Attorney General's informer witnesses (R. 121). However, the testimony of two of the witnesses on whom it relied was that Marixism-Leninism teaches that capitalism can be superseded peacefully, and a third gave no testimony on force and violence. A fourth witness (Matusow) contradicted himself and besides cannot, as the Board came to recognize (*infra*, p. 213), be credited. The most contemporary of the Attorney General's witnesses who testified on this subject was Lautner. Lautner's testimony, to which the Report does not refer, was that petitioner advocated a peaceful transition to socialism at the time of his expulsion from the Party in 1950. The Report also ignores oral and documentary evidence on this issue introduced by petitioner. (The evidence on this subject is discussed *infra*, pp. 205-07.)

The court below did not express concurrence in the Board's finding that petitioner advocates violent means to achieve its ultimate socialist objective. It noted (R. 2144) the testimony of petitioner's witness, Gates, that petitioner advocates a peaceful and constitutional road to socialism. It further took note (*ibid.*) of the declaration

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the facts on which he relies for relief. Moreover, as the Supreme Court held in *Schneiderman* v. *United States*, *supra*, at 160, in a civil action which "involves an important adjudication of status * * * the Government should be limited, as in a criminal proceeding, to the matters charged in its complaint."

in petitioner's constitution (A. G. Ex. 374) that, "The Communist Party upholds the achievements of American democracy and defends the United States Constitution and Bill of Rights against its reactionary enemies who would destroy democracy and popular liberties." Referring to this declaration, the court acknowledged (R. 2144) that it is "the established position of Communist leaders that American democracy has gone far in protecting the rights of minorities and of working people and in advancing the economic status of such people, and that in that respect American democracy receives the plaudits of those leaders."

The court nevertheless affirmed the finding of the Board on "allegiance" (R. 2151), in part because "the Party U.S.A. regards the Government of the United States as an imperialist government, and the ultimate essence of the Communist movement is the overthrow of imperialist governments." Obviously, however, advocacy by petitioner's leaders and members of the "overthrow" of imperialism and eventual establishment of socialism in this country by constitutional means does not evidence any lack of allegiance to the United States. *Schneiderman* v. *United States, supra,* at 136-46. Much less does such advocacy have any rational relation to the proof required by section 13(e)(8) that petitioner's leaders or members owe "obligations" to the Soviet Union superior to their allegiance to this country.

(b) The Board and the court below also relied on the concept of just and unjust wars which, they asserted, is a Communist doctrine that the Soviet Union must be supported in any war between that country and an imperialist power (R. 125-37, 2151). The Board's conclusion to this effect was based on the testimony of informer witnesses as to what was allegedly taught in certain Communist schools prior to the date of the Act (R. 125-27). The only official and authoritative statement of petitioner or its leaders which the Report cites on this question refutes its findings

(see A. G. Ex. 331; R. 127, 1632-4). That statement emphasized petitioner's belief in the possibility and desirability of the peaceful co-existence of capitalism and socialism. It added that if, despite the efforts of the peace forces of America and the world, "Wall Street" should initiate an aggressive war, petitioner would oppose it and would cooperate with all democratic forces "to bring such a war to a speedy conclusion on the basis of a democratic peace." Obviously, this position is not incompatible with full and faithful allegiance to the United States.

(c) The third basis for the Board's finding on allegiance consists of a hodge-podge of evidence, all relating to matters prior to the date of the Act.

The Report and the opinion below cite testimony that on several occasions some of petitioner's members pledged to be faithful to the teachings of Marxism-Leninism and to defend the Soviet Union. They likewise cite some references made to that country as "the worker's Fatherland." The Report refers to a resolution of the 1935 Congress of the Communist International and to petitioner's 1949 telegram of birthday greetings to Stalin, both of which recognized him as a great Communist leader (R. 122-25, 2151-52). These items on their face obviously do not demonstrate lack of allegiance to the United States. Their real import is discussed *supra*, p. 128-29.

In addition, the Report cites the testimony of a number of witnesses that they were taught that Communists owe allegiance to the Soviet Union or to the "democratic forces of the world" (R. 125-27). This testimony was all pre-Act, and represented merely the conclusory statements of informers (see, e.g., R. 974). Furthermore, the Report ignores the detailed testimony on this question of petitioner's witnesses, corroborated by official statements of its Chairman and General Secretary (R. 1235-41, 1282-83; C. P. Ex. 55, p. 3; C. P. Ex. 56, p. 3).

(d) The fourth basis of the Board's finding on allegiance consists of the only two post-Act matters on which it relied under this topic. These are: (1) an article by a leader of petitioner which criticized United States foreign policy as inciting war against the Soviet Union and urged support of what he termed "the peace policy of the Soviet Union" (R. 125-6; A. G. Ex. 477, R. 1773-5), and (2) the fact that petitioner opposed the Korean war as an unjust war of aggression by the United States and her allies (R. 127).

It is clear from the foregoing summary that the Board and the court below regarded opposition to the cold war, advocacy of socialism, and praise of the achievements of the Soviet Union and its leaders, as incompatible with allegiance to the United States and as evidence of "obligations" owed to the Soviet Union. Thus the Board and the court embraced what Professor Henry Steele Commager has called "the new loyalty" (*Living Ideas in America*, N. Y. 1951, p. 410):

> "What is the new loyalty? It is above all, conformity. It is the uncritical and unquestioning acceptance of America as it is—the political institutions, the social relationships, the economic practices. It rejects inquiry into the race question or socialized medicine, or public housing, or into the wisdom or validity of our foreign policy. It regards as particularly heinous any challenge to what is called the 'system of private enterprise,' identifying that system with Americanism. It abandons evolution, repudiates the once popular concept of progress and regards America as a finished product, perfect and complete."

B. The Factors Relied on by the Court Below.

The court below sustained the ultimate finding of the Board that petitioner is a Communist-action organization primarily on the basis of six factors. It characterized these as "underlying basic facts" that "are heavy in the scales" and "determine the final answer" (R. 2138). A review of those six factors demonstrates that they do not

satisfy any of the criteria of section 13(e) and have no rational relation to the section 3(3) definition of a Communist-action organization.

These factors were:

(1) The fact that petitioner "presents no evidence of a repudiation of world Communist doctrines" subsequent to its disaffiliation from the Communist International in 1940 (R. 2138-42, 2147).

(2) The fact that petitioner calls itself the Communist Party of the United States. The court explained that "it is difficult for us to see why the Party would call itself the Communist Party of the U.S.A. if it were not in fact a part of the Communist movement in theory and program" (R. 2142).

(3) The fact that the reconstitution of the Communist Party in 1945 resulted from what was considered to be a prior departure from the principles of Marxism-Leninism (R. 2142-43).

(4) The fact that petitioner adheres to the "ultimate objective" of Marxism-Leninism, "a classless, stateless world" (R. 2143).

(5) The fact that "the Party's press follows closely world Communist views" (R. 2144-45, 2147).

(6) The fact that petitioner's views on the series of international questions testified about by Mosely (see *supra*, p. 137) were similar to the views of the Soviet Union (R. 2145-46).

As we have seen (*supra*, p. 155), the court below did not find that any of these factors involve the advocacy of violent or unconstitutional means for the attainment of petitioner's immediate or ultimate objectives.

Accordingly, the court held that petitioner is a Communist-action organization primarily because it believes in the principles of Communism, advocates a "classless state-

less world," calls itself the "Communist Party of the United States," and has adopted views on certain questions of foreign policy which are similar to those of the Soviet Union. Plainly, none of these facts (all of which are undisputed) has any tendency to prove either the criteria of section 13(e) or the ultimate issue under section 3(3) that petitioner is "dominated and controlled" by the Soviet Union and operates to effectuate the seditious and criminal objectives which section 2 attributes to the world Communist movement.

II. The Order of the Board and the Decision Below Violate the Act Because They Rest on Alleged Conduct of the Petitioner Which, If It Ever Took Place, Had Been Discontinued Prior to Enactment of the Act.

The issue before the Board was the current character of petitioner, i.e., whether or not it was a Communist action organization at the time of the administrative proceeding, or, in any event, after September 23, 1950, the date of enactment of the Act.

Sections 13(g) and (h) make it the duty of the Board to determine whether a respondent in a proceeding before it "is" or "is not" a Communist action organization. Similarly, the definition of a Communist action organization in section 3(3) and the evidentiary tests of section 13(e) are all phrased in the present tense. Accordingly, the Act requires the Board to base its findings and order upon evidence of relevant current policies and practices of an organization and precludes it from basing them upon past policies and practices.

The express terms of the Act are re-enforced by the principle favoring the prospective construction of legislation and by the constitutional prohibition of ex post facto laws. *White* v. *United States*, 191 U. S. 545, 552; *Shreve-*

port v. *Cole*, 129 U. S. 36; *Cummings* v. *Missouri*, 71 U. S. 277; *Ex Parte Garland*, 71 U. S. 333; *Pierce* v. *Carskadan*, 83 U. S. 284; *Burgess* v. *Salmon*, 97 U. S. 381.

The Board's order, therefore, must be supported by proof of relevant acts and practices of the petitioner subsequent to the date of the Act. Evidence of petitioner's conduct prior to that date is relevant, if at all, only to the extent that it serves to interpret or explain the significance and purpose of post-Act activities. The rule is "that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced *if it tends to show the purpose or character of the particular transactions under inquiry.*" *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 705 (emphasis supplied).[92]

Since the Board's order must be based on post-Act conduct, the Board was required to show by its findings a basis for its order in post-Act evidence (sec. 13(g)). This the Board failed to do. Instead, the Report ranges over the entire thirty-three years of petitioner's history, indiscriminately commingling discussion of a few alleged contemporary practices with discussion of alleged episodes of the remote past. As the court below acknowledged (R. 2126), most of the Attorney General's evidence dealt with

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[92] That case indicates, however, that evidence of past transactions is not admissible even for this limited purpose, where the effect of the proceedings is not to regulate future practices but, as in this case, "to punish or to fasten liability on respondents for past conduct" (p. 706). In *United States* v. *Dennis*, 183 F. 2d 201, 231, the Second Circuit held in a criminal proceeding that evidence of conduct prior to the date of the statute creating the crime was admissible for the limited purpose stated in the *Cement Institute* case. However, it recognized that decisions in other circuits, in agreement with the dictum in *Cement Institute*, held that in criminal matters such testimony is not admissible for any purpose. *Wolf* v. *United States*, 259 F. 388, 393; *Haywood* v. *United States*, 263 F. 795. And see *Dalton* v. *United States*, 154 Fed. 461; *Kammann* v. *United States*, 259 Fed. 192.

the period prior to petitioner's disaffiliation from the Communist International in 1940, and the bulk of the Report is likewise devoted to this period.[93]

A minute examination of the 137 pages of the Board's printed Report is required to identify the post-Act evidence. When that task is done, it becomes apparent that the Report cites no evidence of post-Act conduct which can conceivably support a registration order, even under the irrational criteria of section 13(e).

We therefore proceed to examine the post-Act evidence relied on by the Board.

"Financial aid," "training," "reporting." There is not even a suggestion of post-Act evidence under these three standards. The Report acknowledges that there was no evidence of post-Act foreign financial aid (R. 88). Moreover, the only instance of such aid claimed after 1940 stems from a misrepresentation of hearsay testimony of the discredited Matusow (see *supra*, p. 145; *infra*, p. 207). The Report likewise acknowledges that there was no evidence of "instruction and training" subsequent to the outbreak of World War II (R. 92), and in fact the last instance cited by the Report occurred in 1936 (see *supra*, p. 146). Even

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[93] Nineteen of the Attorney General's witnesses had once held membership in the Communist Party. Fourteen of these had left or been expelled from the Party prior to the date of the Act, eight of them for periods ranging from five to twenty years before the Act (R. 134-35). None of the fourteen gave testimony as to the character or activities of the petitioner subsequent to the termination of his membership. The testimony of the five witnesses who had remained in the Party after the date of the Act (*ibid.*) was meagre and related almost exclusively to the period before that date. These witnesses had been rank and file members or minor local officers. Two of them had become virtually inactive in the Party prior to the date of the Act (R. 1034-35; Tr. 12360). Except for Harvey Matusow, all five produced little evidence on which the Board relied. The bulk of the documentary evidence relied upon by the Board consisted of Communist writings which likewise long antedated the Act, going back for a century. Contemporary writings are largely ignored, and, in any event, do not support the Board's propositions.

on the Board's perverted concept of what constitutes a "report," it found none after the date of the Act. And under any rational definition of "reporting," the Report cites nothing after 1935 (see *supra*, pp. 146-50). Moreover, as we have seen (*ibid.*), the court below struck the Board's finding on reporting as not supported by the evidence.

"Policies and Directives." The only post-Act evidence cited by the Report consists of the following irrelevancies:

a. Published statements of petitioner opposing the cold-war policies of the Truman Administration and advancing positions similar to those of the Soviet Union (and many non-Communists) on the rearming of Germany and Japan, atomic weapons, a cease-fire in Korea, etc. (R. 53-54).

b. Published statements of petitioner urging that the main direction of its work in the labor movement be towards workers in the A. F. of L. and C. I. O., inasmuch as the great majority of the organized workers are members of these organizations (R. 69).

c. Published statements of petitioner stressing the importance of enlisting the support of young people in the struggle for peace, outlining a program of immediate demands for young people, including opposition to extension of the draft, and commenting favorably on the position of young people in the Soviet Union (R. 71-72).

d. Published statements of petitioner that the Negro people and their struggle for first-class citizenship in this country are an important source of strength to the working class in its struggle against reaction, as well as for the ultimate establishment of socialism (R. 76-77).

e. Published statements of petitioner calling upon its members to examine their mistakes more closely and to strive for unity and discipline (R. 58, 63).

f. The facts that the *Daily Worker* receives and prints despatches from abroad, including Moscow, and stations a correspondent in Moscow, and that the newspaper of the Communist Information Bureau is purchased, read and discussed by some of petitioner's members.[94]

g. Completely discredited testimony of the F. B. I. informer and provocateur, Scarletto, concerning an alleged conversation in a local club meeting on the Korean war (R. 47; see *infra*, pp. 206-07), and the testimony of another informer witness that a speaker at a 1951 meeting had referred "to the necessity of infiltrating the different unions" (R. 70).

h. The fact that some of petitioner's present officials held positions in the Communist International prior to 1940, and visited and, in some cases, studied in the Soviet Union before 1940 (R. 20).

"Foreign Discipline." The post-Act evidence cited by the Board relates exclusively to irrelevant instances of internal discipline, as follows:

a. The provision of petitioner's constitution that "personal or political relations with enemies of the working class or the nation are incompatible with membership in the Communist Party" (R. 102).

b. A report made to petitioner's 1950 convention in which the speaker warned against factionalism and said that renegacy from Communism inevitably leads the renegade to hostility towards the Soviet Union (R. 101).

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[94] The only other reasonably contemporaneous (though pre-Act) matters relied on by the Report to support its conclusion that the "Communist press" is a source of Soviet directives are that a May, 1950 article in *Political Affairs*, a publication of petitioner, quotes articles from *Pravda* and *For a Lasting Peace*, and that "some of the articles which are in evidence from *Pravda* contain specific references to the United States" (R. 63).

c. Petitioner's expulsion of one Warwick Tomkins (otherwise unidentified) for urging its members to distribute anti-Soviet leaflets (R. 103).

"Secret Practices." The Report contains scattered references to current practices, such as the reduction in the size of party branches and committees, the discontinuance of membership cards and lists, etc. However, all these matters were irrelevant since, as the court below held in setting aside the Board's finding under this criterion (R. 2151), the evidence failed to establish that petitioner's precautionary practices were adopted for either of the purposes specified in section 13(e)(7).

"Non-Deviation." The post-Act evidence cited by the Report is to the effect that petitioner's views opposing particular aspects of U. S. foreign policy were similar to those of the Soviet Union (R. 83-84). As we have shown (*supra*, pp. 137-44), this evidence is irrelevant since it does not establish "non-deviation" within the meaning of section 13(e)(2).

6. *"Allegiance."* The only post-Act evidence the Report cites is petitioner's opposition to the Korean war (R. 127) and an article published by petitioner which refers to the Soviet Union as the "leader of the world peace camp" and urges support of its peace policy (R. 125-126). The burden of the Board's findings on "allegiance" is its assertion that petitioner advocates the violent overthrow of our government. It cites no post-Act documentary evidence to that effect, and, in fact, all of the post-Act evidence establishes the contrary.[95] Moreover, as we have seen (*supra*, p. 155),

[95] See *infra*, pp. 205-07. The Report makes the misleading statement that advocacy of violence was established by the testimony of witnesses whose membership "spanned the entire existence of the Party until January, 1951" (R. 121). However, as Appendix A of the Report reveals (R. 134-35), only one of these witnesses (Matusow) was a member subsequent to the date of the Act. None of the others was in a position to testify as to the post-Act advocacy or did so, and Matusow's testimony on the subject (aside from its unreliability) also related exclusively to the pre-Act period.

the court below did not endorse the Board's findings on this subject.

We have now reviewed every item of post-Act evidence referred to in the Report and relied upon by the Board. This review demonstrates that as to two of the eight statutory standards ("financial aid" and "training") the Report itself concedes that there is no post-Act evidence. As to a third ("reporting"), none of the evidence relied on by the Board relates to the post-Act period, and the Board's findings on the subject were stricken by the court below. The court likewise invalidated the Board's finding on secret practices. As to the remaining four standards, the post-Act evidence consists of a handful of scattered incidents and writings which are absurdly irrelevant and immaterial to the criteria of 13(e) as well as to the definition of 3(3).

The six factors which the court below regarded as determinative of the case against petitioner likewise do not involve relevant post-Act conduct. The only current matters to which they refer are petitioner's adherence to the ultimate Communist objective of a "classless, stateless world" and its advocacy of various international policies similar to those supported by the Soviet Union (R. 2138-47; see *supra*, p. 159).

It is obvious that the evidence as to petitioner's current activities relied upon by the Board and the court below cannot support a registration order. At most, it establishes that petitioner (1) is an American political party which subscribes to the principles of Communism, and (2) opposes cold war policies of the national administration and advocates certain policies on international questions which are similar to those of the Soviet Union and which it believes to be in the interest of world peace. Both of these facts have been repeatedly and publicly asserted by petitioner and were alleged in its answer (R. 165-66). They provide no evidence whatsoever that petitioner is a Communist-action organization, either within the section

3(3) definition or on the basis of the evidentiary standards of section 13(e). Since the "particular transactions under inquiry" (*Cement Institute* case, *supra*) cannot conceivably support a registration order, there is no present conduct to explain, and the pre-Act evidence utilized by the Board and the court below can serve no function and has no relevance.

The evidence as to current practices here is far weaker than that in *United States v. Oregon Medical Society*, 343 U. S. 326, where the Court reversed an anti-trust injunction, saying (at 334):

> "Striking the events prior to 1941 out of the Government's case, except for purposes of illustration or background information, little of substance is left. The case derived its coloration and support almost entirely from the abandoned practices."

An order against petitioner could not properly be issued, therefore, even if the only evidence in the proceeding had been that offered by the Attorney General. The fact is, however, that the petitioner's witnesses, Gates and Miss Flynn, testified that subsequent to the date of the Act and for the preceding years during which they served on petitioner's national committee,[96] petitioner (1) received no foreign directives, but formulated and carried out its policies independently; (2) arrived at its views and policies on the basis of its independent judgment of the needs and interests of the American people; (3) received no foreign financial aid; (4) did not send members or representatives abroad for instruction or training; (5) did not report to any foreign government or organization; (6) was not subject to and did not recognize any foreign disciplinary power; (7) exercised only such precautionary measures of concealment as it believed necessary to protect itself and its members against unjust persecution; and (8) owed allegiance only

[96] Gates has served continuously since 1945 (R. 1199-1200) and Miss Flynn continuously since 1938 (R. 1275).

to the United States (R. 1211-27; 1235-41; 1282-91; Tr. 15031-32; 15795-96).

The Board dismissed this uncontradicted testimony with the bald statement that it did not establish the facts "to our satisfaction" (R. 130). It also said that "the record contains ample post-Act evidence which, when illuminated, supports our finding" (*ibid.*). But it never documented this untrue assertion by stating what this evidence was or how the scanty and irrelevant post-Act references in the Report could be or were "illuminated" into proof.

Apparently recognizing that the post-Act evidence could not support a registration order, the Board invoked a vague presumption of "continuance" (R. 130). However, it nowhere identified the pre-Act evidence on which it relied as the foundation of the presumption or the nature of the pre-Act conduct presumed to have continued.[97]

It is obvious, moreover, that continuance cannot be presumed in the face of petitioner's uncontradicted denials and evidence as to post-Act practices. "At most," a presumption of continuance "is but a rebuttable presumption which can not be weighed in the balance as against evidence." *Sherman Inv. Co.* v. *United States*, 199 F. 2d 504, 507. Furthermore, continuance cannot be presumed in the face of changed circumstances, such as petitioner's disaffiliation from, and the subsequent dissolution of, the Communist International. See *Wigmore on Evidence*, 3rd ed., v. 2, sec. 437. Nor can it be presumed that alleged conduct which was permissible at the time it occurred continued after passage of a statute which imposes sanctions for such conduct.[98]

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[97] The absurdity of the Board's approach is illustrated by the fact that it found that foreign instruction and training stopped in 1936 (R. 90, 92), some 14 years before the Act. If there is an applicable "presumption," it should be one of discontinuance, not continuance.

[98] *Federal Trade Commission* v. *Cement Institute*, *Wolf* v. *United States*, *Haywood* v. *United States*, *Kammann* v. *United States*, *Dalton*

The outer limit on the use of evidence of pre-Act conduct, as stated in *Cement Institute, supra,* is to "show the purpose or character of *the particular transactions under inquiry.*" It cannot be used as a substitute for evidence of these transactions, i.e., of relevant post-Act conduct. Yet this is precisely what the Board did when, in violation of the Act and the *ex post facto* clause, it rested its order on a presumption.

The court below rejected, without discussion, our contention that the order of the Board must be supported by evidence of relevant practices engaged in by petitioner subsequent to the Act (R. 2140). Like the Board, it invoked a presumption of continuance. It found that "in the years prior to 1940 the Communist Party USA was dominated and controlled by the world Communist movement" because during that period petitioner was affiliated with the Communist International and bound by its decisions (R. 2138-40). It then held that petitioner's affiliation with the Communist International prior to 1940 was decisive of its present status as a Communist-action organization (R. 2141). The court's theory was that the past conduct of an organization is material to its present nature in the absence of "affirmative evidence of a departure from the established past" (R. 2140). It found that petitioner's disaffiliation from the Communist International and the latter's dissolution did not constitute such a "departure," stating:

> "To demonstrate a changed nature in the Party USA, some assertion of a change in substantive belief and program would have to be made" (R. 2141).
>
> "If the Communist Party USA does not adhere to the basic ultimate objective of Marxism-Leninism [i.e.,

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v. *United States,* all *supra.* In *United States* v. *Dennis,* 183 F. 2d 201, the Court made clear the limited purpose for which it held pre-act evidence admissible, saying (at 231): "It is *toto coelo* a different question whether we are treating them [acts performed prior to the enactment of the law] as *media concludendi* or as the *factum* itself." Under the Board's presumption of continuance, however, the pre-Act conduct became "the *factum* itself."

'a classless, stateless world'], some vivid evidence to that effect should be readily available. . . . But this record contains no such evidence" (R. 2143).

The court's conclusion violates the terms of the Act and is completely illogical. The Act does not purport to require the registration of an organization which holds particular beliefs or opinions unless at least it is *currently* under foreign domination and control.

The court acknowledged, however, that the Communist International, from which petitioner disaffiliated in 1940, dissolved in 1943 and has not been replaced by any other instrumentality through which the "world Communist movement" could exercise control over petitioner. Whatever reasons may be claimed for petitioner's adherence to Communism prior to 1943, its subsequent adherence thereto has plainly been voluntary. The record contains no evidence of foreign coercion or enforced conformity, the court cites none, and the uncontradicted testimony of petitioner's witnesses is that there has been none (*supra*, p. 167).

The court's presumption of a continuance of foreign control from petitioner's failure to repudiate its opinions and beliefs is a complete non-sequitur. By it, the court, like the Board, permitted no escape to petitioner from its past affiliation with the defunct Communist International, except by suicide. It can avoid proscription under the Act as applied by the Board and the court only by repudiating its program and policies and ceasing to be a Communist Party in fact and even in name (see R. 2142). Such an application patently violates both the Act and the *ex post facto* clause.

III. The Board and the Court Below Applied the Act in Violation of the First Amendment.

It is apparent from the face of the Report that the findings of the Board were based primarily on the contents of

books, periodicals and press statements setting forth views on social, economic, and political questions. Indeed, apart from a few matters that are either patently irrelevant or unfounded in fact, all of the post-Act evidence cited in the Report consists of publications containing expressions of petitioner's views (*supra*, pp. 162-66). Moreover, the six factors which the court below regarded as determinative in affirming the order of the Board relate exclusively to petitioner's views and policies (*supra*, p. 159).

In grounding and affirming the order on these expressions of opinion, the Board and the court magnified the vice inherent in the Act that it imposes sanctions for peaceable advocacy and association.

The Report and the opinion below do not, and on the record could not, suggest that petitioner advocates anything but peaceful, lawful, and democratic means to win the acceptance and adoption of its immediate objectives. Moreover, the Board expressly disclaimed any finding that these objectives are antagonistic to the interests of the American people, but stated (R. 81) that petitioner "was not permitted, and rightly so, to put in issue the merits of the views or policies of [petitioner], which views and policies were placed in evidence by the [Attorney General] to establish 'non-deviation.'"

Unquestionably the reliance of the Board and the court below on petitioner's views and advocacy concerning current international and domestic issues violates the First Amendment. This advocacy presents no danger of any evil against which the government may act. The Board and the court did not and could not find, for example, that petitioner's advocacy of a cease-fire in Korea, the seating of the People's Republic of China in the United Nations, the abandonment of the cold war policy, guarantees of full equality for the Negro people, the repeal of the Taft-Hartley, Smith, and McCarran Acts, and an increase in social security benefits (R. 53-54, 83-84, 77), presents any "danger"

which Congress may suppress. Yet they based the registration death sentence in large part upon petitioner's advocacy of these views.

In short, the Board and the court below have added two additional exceptions to the clear and present danger exception to the First Amendment. These are that advocacy may be abridged, and indeed prohibited, if it is critical of the policies of the national administration or advances views on foreign affairs which are similar to those of the Soviet Union. The only "danger" that such advocacy presents is that the views in question may be adopted by the administration upon which they are urged or that the voters may be persuaded to elect a new administration which will adopt them. The only "danger," therefore, is the democratic process itself. As the Court said in *Stromberg* v. *California*, 283 U. S. 359, 369:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be made by lawful means, an opportunity essential to the security of the republic, is a fundamental principle of our constitutional system."

It is this fundamental principle which the Act was designed to subvert and which its application by the Board and the court below would destroy.

The crass infringement of the First Amendment is not mitigated by the Board's assertions: (a) that petitioner's concededly legitimate political views were not arrived at independently but were the product of alleged foreign directives embodied in Marxist writings, and (b) that however meritorious these views may be, they were advocated with an evil motive. These assertions are unfounded and false (see, *supra*, pp. 120-37). But even if they were true, they could furnish no justification for abridging petitioner's rights of advocacy and association. Freedom of speech, press and assembly may not be denied because the doctrine

taught is found to derive from a "bad" source or to be advocated for a "bad" motive. The "fundamental principle of our constitutional system," referred to in *Stromberg*, does not rest on so precarious a premise. Accordingly, the reliance by the Board and the court below on petitioner's peaceable advocacy on current issues requires a reversal.

The same thing is true of the reliance on petitioner's adherence to the principles of Marxism-Leninism. It is true that the Board asserted that Marxism-Leninism is a doctrine that advocates as an ultimate objective the violent overthrow of the government. This assertion is contrary to the evidence and to *Schneiderman* v. *United States*, *supra*, and was not accepted by the court below (see *supra*, p. 155, *infra*, pp. 205-07). But even if the Board's version of Marxist-Leninist teachings were correct, its reliance thereon to support the registration order would be unconstitutional. A showing that petitioner advocates the violent overthrow of the government would (if other constitutional prerequisites were met) at most authorize the prohibition of such advocacy. As we have shown, however, the registration order and the Act's sanctions are not so confined, since they abridge petitioner's right to speak and publish on any subject and to assemble for any purpose.

Furthermore, the Report is barren of findings which are prerequisite to the imposition of sanctions, even if confined to the advocacy of the violent overthrow of the government. The Court sustained the Smith Act convictions in the *Dennis* case, *supra*, only on the grounds that (1) the jury had found that the advocacy was accompanied by an intent to "overthrow the . . . the government of the United States by force and violence as speedily as circumstances permit," and (2) the trial judge had found that the advocacy, when coupled with this specific intent and under the current world conditions, created a clear and present danger. (See *Dennis*, at 499, 502, 510.) Neither the Board nor the court, however, made any such findings.

On the contrary, the thrust of the Report and the opinion below is that petitioner should be ordered to register merely because it believes in the principles of Communism. The Board relied on the content of Marxist literature to support its conclusion that those who agree with its precepts are, *ipso facto*, seditious foreign agents. For example, it stated that "by the acceptance of and adherence to Marxism-Leninism [petitioner], subjects itself to the authority of the Soviet Union" (R. 79). The court below went even further, holding (R. 2148) that petitioner's belief in a "stateless, classless world" is a determinative factor in establishing that it is a Communist-action organization. Thus the Board imposed and the court affirmed the registration order on the basis of mere belief. This is patently unconstitutional.

In *American Communications Associations* v. *Douds*, 339 U. S. 482, the six Justices who participated in the decision divided evenly as to the validity of that portion of section 9(h) of the Taft-Hartley Act which requires affidavits denying belief in the forcible overthrow of the government.[100] The three Justices who sustained the belief portion of the affidavit recognized that Congress could not forbid or punish the holding of any belief and upheld this provision of section 9(h) on the ground that the "sole effect of the statute upon one who believes in overthrow of the government by force and violence—and does not deny his belief—is that he may be forced to relinquish his position as a union leader" (at 408). "We have noted," they stated, "that the distinction is one of degree" (at 409).

Thus even by the test of the latter three Justices a registration order under the present Act cannot be predicated on belief. For the sanctions and disabilities which the order entails are so comprehensive and severe, and are fortified by such extravagant criminal penalties, that they obviously surpass any permissible "distinction of degree."

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[100] In *Osman* v. *Douds*, 339 U. S. 846, the Court divided four-four on the validity of the belief portion of the affidavits.

IV. The Court Below, Having Invalidated Key Findings of the Board, Erred in Not Remanding the Case for Administrative Redetermination.

As we have seen (*supra*, pp. 120-58), the Board rested its decision that petitioner is a Communist-action organization on findings adverse to petitioner under each of the eight criteria of Section 13(e). Since the Board's ultimate conclusion was based on the totality of these eight findings, it cannot be said that the same conclusion would have been reached if any of the findings had been omitted or had been to the contrary effect.[101]

The court below struck the finding of the Board under the "reporting" criterion of section 13(e)(5) (see *supra*, p. 149). It also set aside the Board's finding that the purpose of petitioner's so-called "secret practices" was to promote its objectives and to conceal Soviet control. It thereby invalidated the Board's entire finding under section 13(e)(7). (See *supra*, p. 154). Accordingly, the premises on which the Board acted do not support its ultimate conclusion and order, since it based its order on the sum of eight findings, not on six.

Furthermore, the court below held that the "non-deviation" criterion of section 13(e)(2) had no relevance to the "objectives" component of the section 3(3) definition. The Board, however, used its finding on "non-deviation" to support its conclusion on that component of the definition, as well as on the foreign control component. (See *supra*, p. 142.) In this respect as well, therefore, it is clear that the Board based its ultimate conclusion and order on a premise held by the court to be erroneous.

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[101] We have shown that the Board was a biased tribunal which would inevitably have found against the petitioner no matter what the state of the record. But if the Court accepts this contention, a reversal is required on the ground that petitioner did not have a fair hearing.

Section 14 of the Act permits affirmance of a registration order only if the findings of the Board are supported by a preponderance of the evidence. The court below held that two of the key findings were not so supported and that a third was given an erroneous application. Therefore it could not validly affirm the Board's order, but should have remanded the case for administrative redetermination in the light of the court's action.

A remand was also required by the familiar principle that an administrative order cannot be sustained unless the grounds on which the agency predicated it are valid. In violation of this principle, the court below acted as though it were the administrative agency and the Board its trial examiner.

The decision below contravenes *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469. There the Court remanded an administrative order because the agency's ultimate conclusion rested on findings which had insufficient evidentiary support. The Court recognized that the agency could validly have reached the same ultimate conclusion by making other findings supportable by the record before it. Nevertheless it remanded the case so that the agency could decide anew on the existing record after discarding the invalid findings.

The decision below is also contrary to *S.E.C.* v. *Chenery Corp.*, 318 U. S. 80, which remanded an administrative proceeding because the order could not be sustained on the bases on which the agency acted, although it might have been valid if the agency had applied correct premises. The Court stated:

> "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based" (at 87).
>
> "The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act" (at 94).

> "We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained" (at 95).

See also, *I.C.C.* v. *C.B. & Q.R.R.*, 186 U. S. 320, 341; *Colorado Wyoming Gas Co.* v. *F.P.C.*, 324 U. S. 626, 634; *Atchison Ry.* v. *United States*, 295 U. S. 193, 201-03.[102]

As stated in *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 20:

> "* * * the function of the reviewing court ends when an error of law is laid bare. At that point, the matter once more goes to the Commission for reconsideration."

Here the court below "laid bare" three major errors of law. Accordingly, its decision must be reversed so that the order of the Board may be vacated and the case remanded for agency redetermination.

The necessity for this course is underscored by the fact that of the five findings which survived, two had little if any weight against petitioner. As we have seen, the Board itself found that practices involving "financial aid" and "instruction and training" were not currently engaged in by petitioner (R. 88, 92; *supra*, p. 162), and it advised the court below that it "could not have placed great reliance" on the "financial aid" criterion (*supra*, p. 145).[103] In contrast, it is clear from the Report that the Board relied heavily on two of the invalidated findings. It devotes more pages to "secret practices" than to any other criterion with the exception of "policies and directives" (R. 105-117). And the court below characterized the evidence on "nondeviation" as "one of the chief items of evidence in the case" (R. 2148).

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[102] The action of the court below is also in conflict with its own decisions. *Democrat Printing Co.* v. *F.C.C.*, 202 F. 2nd 298; *Mississippi River Fuel Corp.* v. *F.P.C.*, 163 F. 2d 433, 449.

[103] Moreover, the court below recognized that the "financial aid" and "instruction and training" criteria had no great materiality to the ultimate issue (R. 2123).

PART THREE

PETITIONER DID NOT RECEIVE A FAIR HEARING BEFORE A VALIDLY CONSTITUTED TRIBUNAL.

I. The Petitioner Was Denied a Fair Hearing Because the Members of the Board Were Subjected to Extra-Legal Pressures to Decide Against It and Were Personally Biased and Prejudiced Against It. Two Board Members Should Have Been Disqualified on Affidavits of Bias and Prejudice.

We have shown (*supra*, p. 70) that the Act itself made a fair hearing of this case impossible since a decision in petitioner's favor would have reversed the legislative verdict of guilt, repealed the Act by administrative action, and terminated the jobs and salaries of the Board members. These irresistible pressures were reinforced by extra-legal measures which subjected the unconfirmed Board appointees to policing by the Senate Judiciary Committee, whose then chairman, Senator McCarran, was both the nominal author of the Act and in effective control of the confirmation of appointments to the Board. Moreover, the two Board members who composed the panel during most of the hearing [104] and who wrote the recommended decision clearly evinced their personal bias and prejudice against the petitioner.

A. The Extra-Legal Pressures on the Board Members.

The President named the five original members of the Board by so-called recess appointments on October 23, 1950. He submitted their nominations to the Senate on November 27, 1950 and again on February 12, 1951. (*First Annual*

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[104] The hearing panel was originally composed of three Board members, but the appointment of the third member lapsed because of non-confirmation during the course of the hearing, and he was not replaced (R. 1).

Report, Subversive Activities Control Board, p. 5). However, the Senate Judiciary Committee took no action on these nominations until July 30, 1951, when it reported favorably on Board members Brown and McHale (both members of the hearing panel) and Coddaire, but took no action on Board member LaFollette, the third member and chairman of the panel, and the acting chairman of the Board.[105] The three nominees who were favorably reported were confirmed by the Senate ten days later. (*Second Annual Report, Subversive Activities Control Board*, p. 5.) The LaFollette nomination died in committee with the adjournment of the Eighty-Second Congress on October 20, 1951, at which time Mr. LaFollette ceased to serve (R. 1).

Accordingly, for many months during the pendency of the administrative proceeding,[106] the tenure of the Board members was subject to the pleasure of the Senate Judiciary Committee, whose chairman had the power to block confirmation if their conduct of the proceeding did not conform to his wishes. It was this committee which stated in its report on the legislation that "there is incontrovertible evidence of the fact that the Communist Party of the United States" has all of the characteristics of a Communist-action organization (*supra*, p. 45).

The pressures on the Board members generated by this situation were recognized by the Board's first chairman, Seth W. Richardson. One week before the taking of testimony in this proceeding began, Mr. Richardson publicly admitted that the Board's handling of the case had been "psychologically complicated" by the failure of the Senate

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[105] The fifth original member of the Board and its first chairman, Mr. Seth W. Richardson, resigned on June 6, 1951, because of his health (*First Annual Report, Subversive Activities Control Board*, p. 5).

[106] The petition was filed on November 22, 1950, and after pre hearing motions were disposed of, the panel began to hear testimony on April 23, 1951 (R. 1).

to confirm the members of the Board. *N. Y. Times*, April 16, 1951, p. 25. The existence of these pressures was also the subject of public comment. The *Washington Post* stated in an editorial:

> "Unhappily, however, there is a great deal of force to the contention put forward by Vito Marcantonio that 'this board sits in jeopardy, and if at any time it takes a view contrary to that of the chairman of the Senate committee (Senator Pat McCarran) which is to pass on its nominations the members may never be confirmed in the positions to which they have been appointed' * * *. The Board entirely lacks the independence necessary to its quasi-judicial function." (Quoted in Frantz, *Tooling Up for Mass Repression*, The Nation, Dec. 12, 1953, p. 496.)

See also N. Y. Times, April 15, 1951, p. 1.

The gun of non-confirmation which the Senate Judiciary Committee thus held at the heads of the Board members was loaded with live ammunition. This is established by the evidence developed at the hearing and confirmed by the political execution of Board member LaFollette.

Gitlow, the first witness called by the Attorney General, was in frequent contact with one Benjamin Mandel during his appearance on the witness stand. Mandel was then employed by the Senate Subcommittee on Internal Security, a sub-committee of the Senate Judiciary Committee, and, like the latter, under the chairmanship of Senator McCarran (R. 282, 295-97). The subjects discussed by the witness and Senator McCarran's employee were also established. Gitlow testified, "I discussed the conduct of this case, I discussed the attorneys in the case, I discussed the members of the panel" (R. 295).

Two of the Attorney General's other witnesses, Kornfeder and Crouch, were likewise shown to have been in contact with Mandel, the former almost daily throughout his appearance as a witness (R. 347-49; Tr. 3536-55, 5802-03). The panel, however, excluded cross-examination de-

signed to show that Kornfeder, like Gitlow, discussed the Board members' conduct with Mandel (R. 349).

Nevertheless, the panel members were fully aware from Gitlow's express admission and from the clear implications of the testimony of Crouch and Kornfeder, that their conduct of the proceeding was under surveillance by the chairman of the Senate Committee which, on the one hand, had power to block their confirmation and, on the other hand, had flatly stated that incontrovertible evidence proved petitioner to be a Communist-action organization. The panel chairman bluntly stated his appreciation of the existence and effect of this intolerable situation:

> "Mr. LaFollette: So that my own thinking may be clear for everybody to know, I feel pretty much the same way about this witness discussing my conduct in the hearing room with Mr. Mandel, under the circumstances, as I would if I were a nisi prius judge in an elective office, and a political boss had the right to control my nomination or renomination. I would resent it very much. I don't know that it necessarily proves, of itself, that there was an attempt by this device to intimidate me" (R. 297).[107]

Another revealing incident occurred when Kornfeder (who as already noted, was in almost daily contact with Mandel) evidenced such an arrogant and contemptuous attitude toward Mr. LaFollette that the latter was impelled to surrender the panel chairmanship to Board member (later chairman) Brown. In doing so, Mr. LaFollette stated in part (R. 345-46):

> "In this proceeding, also factually, we recognize, or I do, that there is great public support for anything which the [Attorney General] here proposes, which makes it impossible for me, notwithstanding the stalwart support which I received from my colleague, Dr.

[107] At the inception of the hearing and again after this incident, petitioner moved to adjourn the hearing until the Senate had confirmed the appointments of the Board members (R. 240, 293-95). Both motions were denied (R. 249, 301).

McHale, yesterday, to feel that I can conduct these hearings in a way which will be consistent with orderly procedure.

"I do not believe that I will be able to exercise any control over any witnesses submitted by the [Attorney General] and I think if I cease to exercise the prerogative of presiding we will have a much more orderly process and there will be no delays by any statements made by the presiding officer, which seems to be so offensive." [108]

Kornfeder immediately reported this incident to Senator McCarran's agent, Mandel (R. 348). A few days later, the Board members were "summoned to Capitol Hill * * * for an un-announced 'get acquainted' meeting" with two members of Senator McCarran's Internal Security Sub-Committee. *N. Y. Times*, June 14, 1951, p. 9.

It is obvious that Mr. LaFollette's nomination was killed in committee at least in part as a reprisal for his resistance to the Committee's pressure upon him. The other two members of the panel were confirmed after they had meekly accepted the surveillance and otherwise demonstrated that they could be implicitly trusted to rubber stamp the Act's verdict against petitioner. Indeed, Mr. LaFollette supplied Board member Brown with a weighty credential to Senator McCarran. In his statement surrendering the panel chairmanship from which we have already quoted, Mr. LaFollette referred to his colleague in the following words (R. 346):

"Also, we will have a speedier hearing, I am sure because the Panel Member, Mr. Brown, whom I have asked to preside from now on, has already evidenced the remarkable capacity to make speedy and immediate rulings upon all objections presented to this Panel.

[108] Mr. LaFollette's resignation was set aside by Mr. Richardson, then chairman of the Board (R. 346-7), and LaFollette continued to chair the panel until his appointment terminated upon the adjournment of Congress.

"The fact that they almost uniformly amount to a sustaining of any position taken by the [Attorney General] and a rejection of any position taken by the [petitioner] is purely coincidental, I am sure."

B. The Personal Bias and Prejudice of the Members of the Board.

The two members of the panel (Brown and McHale) whose conduct of the hearing commended them to the Senate Judiciary Committee subsequently demonstrated their personal bias and prejudice against petitioner and a gross disregard for their function as quasi-judicial officers. Their conduct was made the subject of affidavits of bias and prejudice (R. 187-190, 196-199), which the Board erroneously denied (R. 190, 209).

During the course of the hearing, Dr. McHale made a speech before the Women's National Democratic Club in which she discussed the proceeding at some length. She referred to one of the issues of fact which had arisen in connection with the "non-deviation" criterion and to the character of the world Communist movement, and expressed a pre-judgment on both (R. 193-96, 187-90). She indicated her view that the hearing was merely a formality by likening the petitioner to the rabbit in the aphorism, "as an old recipe for rabbit stew goes, we must first catch the rabbit" (R. 196).

Immediately after the issuance of the panel's recommended decision and while the proceeding was pending on review before the full Board, Chairman Brown and the Board's general counsel appeared on a radio and television forum sponsored by Georgetown University and devoted to a discussion of this case from an anti-Communist point of view. The chairman and the general counsel commented on the evidence, expressed self-gratulatory delight with the recommended decision, and stated their conviction that petitioner is a Communist-action organization as defined in the Act. In referring to the Act's definition of Communist-

front organizations, Mr. Brown stated that they are organizations controlled by the Communist Party, thereby demonstrating his awareness of and agreement with the Act's prejudgment (R. 197-98, 206-08).

Accordingly, the provisions of the Act, the pressures and actions of the Senate Judiciary Committee, and the personal bias and prejudice of the Board members, combined to make a fair hearing impossible. External pressures and personal prejudice wrote the order against petitioner, without regard to law or fact.

The record here does not require the court to speculate "on the effect of subconscious psychological pressures" on the members of the Board. Cf. *Shaughnessy* v. *Accardi*, 349 U. S. 280, 283. All of the factors which the Court there held would vitiate the decision of an administrative agency were present here. The Board members were, of course, aware of the terms of the Act, of petitioner's condemnation as a Communist-action organization in the report of the Senate Judiciary Committee, and of the status of their appointments before that Committee. They were "directly or indirectly approached" (*ibid.*) by the Senate Committee at the "get acquainted meeting" and through Mandel. Finally, both the chairman of the Board and the chairman of the hearing panel made statements acknowledging that they were affected by these pressures. It is therefore clear from *Accardi* and the other authorities cited (*supra*, pp. 70-71) that petitioner was denied due process.

Furthermore, the order must be set aside on the independent ground of the refusal of the Board to disqualify Dr. McHale and Mr. Brown. Section 7(a) of the Administrative Procedure Act (5 U.S.C. 1006(a)), made applicable by section 16 of the Act, requires disqualification of a hearing officer or an officer participating in the decision, on the basis of a "sufficient affidavit of personal bias or disqualification." The affidavits of bias and prejudice filed by petitioner on the basis of McHale's speech and Brown's

radio-television performance made a sufficient showing against both these Board members, the test being whether the allegations "give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Berger* v. *United States*, 255 U. S. 22, 33-34.

II. The Original Appointments to the Board Violated the Constitution. The Court Below Should Have Set Aside the Board's Order Because the Acts of the Board Members Prior to Senate Confirmation of Their Appointments Were Invalid.

The pertinent facts with reference to the appointments of the Board members are the following: The Act was passed by Congress over the President's veto on September 23, 1950. Later the same day, Congress adjourned pursuant to a concurrent resolution providing that it should reconvene on November 27, 1950 (96 Cong. Rec. 15895). On October 23, 1950, the President issued "recess" appointments to five persons as members of the Board. On November 27, 1950, upon the reconvening of Congress, the President transmitted the nominations of these persons to the Senate for its advice and consent. On January 2, 1951, the 81st Congress adjourned *sine die* without having acted on the nominations. The nominations were again submitted to the Senate of the 82nd Congress on February 12, 1951. (First Annual Report, Subversive Activities Control Board, p. 5.) The Senate took no action on these nominations until August 9, 1951 when it confirmed three of the appointees. (Second Annual Report, Subversive Activities Control Board, p. 5.)

Article 2, sec. 2, cl. 3 of the Constitution provides:

> "The President shall have Power to fill up all vacancies that may happen during the Recess of the Senate by granting Commissions which shall expire at the end of their next Session."

A. The Original Appointments Were Invalid Because No Vacancies Happened During the Recess.

The offices of Board members could not be filled by recess appointments because they came into being with the passage of the Act on September 23, 1950.

"Vacancies" do not "happen" in the constitutional sense in offices which are newly created by law. In 1813 and again in 1822, the Senate construed Article 2, sec. 2, cl. 3 to refer to vacancies occurring by reason of death, resignation, promotion or removal, and to exclude those which result from the creation of a new office. Story, *Commentaries on the Constitution*, sec. 1559.

Even if "vacancies happened" on the Board upon the passage of the Act, they did not happen "during the Recess of the Senate," but while the Senate was still in session on September 23, 1950.

The only case which passed on the validity of a recess appointment to a newly created office, held that the President had no power to make such an appointment because no vacancy happened, and, in any event, did not happen during the Recess of the Senate. *Schenck* v. *Peay*, 21 Fed. Cas. 672. Cf. *People* v. *Forquer*, 1 Ill. 104.[109]

In the *Schenck* case, the court pointed out (at 674-675) that Webster defines the word "happen" as: "'First, To come by chance; to come without previous expectation. Second. To take place; to occur'." It held that an office newly created by Congress does not "happen" to become vacant within the meaning of the first definition of that term. Nor, if the second definition is applied, does the vacancy "occur" during the recess. Furthermore, the court

[109] The same question was raised in *Ex Parte Ward*, 173 U. S. 452, in an attack by habeas corpus on the appointment of the sentencing judge. The Court disposed of the case without discussing the merits on the ground that the judge's title to office was not subject to collateral attack.

pointed out (*ibid.*) that in defining the term "vacant," Webster states that "'vacancy adds the idea of a thing having been previously filled'." Thus the use of the term "vacancy" also negatives the applicability of the clause to the case of a newly created office.[110]

In accord with the *Schenck* case and the expressions of the Senate in 1813 and 1822, all of the leading commentators accept the view that offices newly created while the Senate is in session may not be filled during the recess. Story, *loc. cit.*; Cooley, *General Principles of Constitutional Law*, p. 104; Pomeroy, *An Introduction to Constitutional Law*, p. 436; 2 Tucker, *The Constitution*, p. 407; Watson, *On the Constitution*, p. 988; Morganston, *The Appointing and Removal Power of the President of the United States*, Sen. Doc. 172, 70th Cong., 2 Sess., p. 136. Two opinions of Attorney Generals are to the same effect: 2 Ops. A. G. 332; 4 Ops. A. G. 362. Three opinions of Attorney Generals are to the contrary: 12 Ops. A. G. 455; 18 Ops. A. G. 28; 19 Ops. A. G. 261.[111]

B. The Appointments Were Invalid Because They Were Not Made "During the Recess."

If the adjournment of the Senate from September 23 to November 27, 1950 was not "the Recess," then clearly the President had no power to make the appointments on October 23, 1950.

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[110] The cases are evenly divided even as to the power of the President to make a recess appointment to a previously existing office where the vacancy (caused by death, resignation or removal) occurred while the Senate was in session. Cf. *Case of the District Attorney*, 7 Fed. Cas. 731 with *In re Farrow*, 3 Fed. 112, the only cases on the point.

[111] Legislative acquiescence in the position of the *Schenck* case, the text writers, and the first two Attorney General's opinions cited above, is indicated by the fact that in 1928 a monograph reiterating this position was by Senate Resolution ordered printed as a Senate document. Morganston, *op. cit.*, p. iii.

In 23 Ops. A. G. 599, Attorney General Knox in a carefully reasoned opinion held that the term "the Recess," as used in Article 2, refers to the *sine die* recess between the annual sessions of Congress or between an annual and an extraordinary session, as distinguished from an "adjournment" under Article 1, sec. 5, cl. 4, which provides for a temporary suspension of business during a session. He concluded that the interval between an adjournment of the Congress to a day certain and its next sitting date was not "the Recess" in the constitutional sense. Hence, he held, the President had no appointive power for vacancies which happen during that period. Attorney General Dougherty rendered a contrary, but wholly unreasoned, opinion. 33 Ops. A. G. 20. Also contrary to the Knox holding are *Case of the District Attorney, supra,* and a dictum in *Gould* v. *United States,* 19 Ct. Clm. 593.

We submit that the Knox opinion correctly states the law and that the original appointments to the Board were invalid because they were not to offices which were vacant "during the Recess."

C. If the Appointments Were Valid When Made, They Expired on January 2, 1951.

Article 2 provides that appointments made during the recess of the Senate "shall expire at the end of their next session." If, contrary to our contention, the adjournment of Congress from September 23 to November 27, 1950, was "the Recess," then November 27 must have been the beginning of its "next session." For clearly, "the Recess" is the interval between sessions. If that be the case, however, the appointments expired on January 2, 1951 when the "next session" ended with the *sine die* adjournment of Congress.

Accordingly, acceptance of the proposition that the appointments were made during a recess compels the conclusion that they expired on January 2, 1951. *The Case of*

the District Attorney, supra, which is the lone judicial authority for the view that a period of adjournment to a day certain is a recess, held that the reconvening of the Senate after such an adjournment is its "next session." Accordingly the only case which supports the validity of the original appointments, supplies authority for the proposition that they expired on January 2, 1951.

D. The Invalidity or Expiration of the Original Appointments Requires That the Order of the Board Be Set Aside.

It follows from the foregoing that for many months during the pendency of this proceeding, when preliminary motions were decided adversely to petitioner and evidence was taken, there was no lawfully constituted Board in existence. The confirmation of the nominations of a majority of the appointees on August 9, 1951, did not, of course, cure the invalidity of the original appointments, but simply gave them title to office from the date of confirmation. *United States* v. *Kirkpatrick,* 6 U.S. 244, 248. Thus the acts and rulings of the purported members of the Board prior to August 9, 1951 (or, at all events, between January 2 and August 9, 1951) were those of usurpers.

Petitioner has standing to assert the invalidity of the appointments in this proceeding. The rule that the validity of the appointment of a *de facto* officer is not subject to collateral attack, as upon a petition for habeas corpus,[112] has no application in this case, where the attack is direct. Moreover, petitioner raised this issue and sought to have it adjudicated at the inception of the proceeding. It first moved before the Board to quash the proceedings on the ground that the appointments of the Board members were invalid (Tr. 61). The Board denied this motion on the grounds that it was without authority to decide constitutional questions and that the issue should await determination upon judicial review of the Board's order (Tr. 113).

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[112] *Ex Parte Ward, supra.*

Petitioner thereupon sued in the District Court to enjoin further proceedings before the Board upon the ground, among others, that there was no lawfully constituted Board in existence. *Communist Party of the United States of America* v. *McGrath*, 96 F. Supp. 47, 48. In denying petitioner's motion for a preliminary injunction, the court said (*ibid*, p. 47):

> "Furthermore, the constitutional questions raised by the plaintiffs can be saved before the Board and determined upon review by the United States Court of Appeals pursuant to the direction of Congress for judicial review of the Board's actions under the controlling statute.[113]

Accordingly, it appears not only that petitioner made timely objection to the illegal composition of the Board but that the statutory court refused to consider the merits of that objection upon the ground that the question should be saved for review by the Court of Appeals.

The court below, however, by-passed consideration of the merits of the constitutional question raised by petitioner. It did so on the grounds (1) that the effect of any invalidity in the appointments was "minimal" because most of the hearing occurred after confirmation of the appointees, and (2) that in any event the appointees can be regarded as trial examiners (R. 2125).

However, the effect of the invalidity of the appointments cannot be measured by the relative amount of testimony taken before and after confirmation. The court below disregarded the fact that key pre-trial motions were denied by the usurpers (Tr. 113-117), who also made precedent setting rulings on the evidence at the inception of the hearing.

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[113] This Court denied petitioner's application for a stay of proceedings before the Board pending an appeal from the order of the statutory court. *Communist Party of the United States* v. *McGrath*, 340 U. S. 950. Thereafter, the proceeding was dismissed (R. 2, ftn. 2).

The court's suggestion that the unconfirmed appointees can be regarded as trial examiners is palpably untenable, if only because there was no compliance with the provisions for the appointment, tenure, compensation and assignment of examiners, prescribed by section 11 of the Administrative Procedure Act (5 U. S. C. 1010), made applicable to this proceeding by section 16 of the Act.

The effect of the judicial rulings that petitioner's initial challenge of the appointments was premature and its renewed challenge was tardy is to deprive it and other litigants of any remedy against usurpations of administrative office. We submit that the constitutional objection to the appointments to the Board is meritorious, was appropriately raised in this proceeding, and requires a reversal of the decision below.

PART FOUR

THE BOARD'S FINDINGS ARE NOT SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE. MOREOVER, THE COURT BELOW ERRONEOUSLY DENIED PETITIONER'S MOTION TO ADDUCE ADDITIONAL EVIDENCE

I. It Appears From the Face of the Report and the Decision Below That the Findings of the Board Are Not Supported by a Preponderance of the Evidence.

Under section 14(a), the Board's order must be set aside if the findings of the Board are not supported by a preponderance of the evidence. The Report and the opinion below show on their face that this evidentiary burden was not met for the following reasons:

(1) There is no relevant post-Act evidence to support either the ultimate finding under section 3(3) or the findings under section 13(e) (see *supra*, p. 160).

(2) The court below set aside the Board's findings under two of the criteria of section 13(e) as not supported by the evidence, and under its decision the Board erred in the application of a third criterion (*supra*, p. 175). Furthermore, petitioner was entitled to favorable findings under three of the 13(e) criteria on which the Board made adverse findings (*supra*, pp. 144-49).

(3) The findings are based on erroneous interpretations and applications of the criteria of 13(e), and there is no relevant evidence to support findings adverse to petitioner under the criteria as correctly construed (*supra*, pp. 120-58).

(4) The evidence relied on by the Board and the court below does not support the finding that there is a

world Communist movement as defined by section 2 (see *infra*, pp. 193-99).

(5) The six "basic facts" on which the court below sustained the finding that petitioner is a Communist-action organization are irrelevant to both the section 3(3) definition and the 13(e) criteria (*supra*, pp. 158-60).

(6) The Board's ultimate conclusion rested solely on its findings under section 13(e). But the criteria of this section, as the court below held, have no relevance to the objectives element of the 3(3) definition (*supra*, p. 46). Hence the Board's ultimate finding as to this component of the definition is not supported either by the evidence or its subsidiary findings.

For each one of these reasons, the decision below must be reversed on the ground that it and the Report show on their face that the registration order lacks evidentiary basis.

II. The Board's Finding With Reference to a World Communist Movement, If Authorized by the Act, Is Not Supported by the Evidence.

We have already seen (*supra*, p. 42) that the court below held that the findings of section 2 of the Act with reference to the existence and nature of a world Communist movement are conclusive upon the Board and the courts.[114] Nevertheless, the court reviewed and sustained the finding of the Board that, on the evidence, "there exists a world Communist movement substantially as described in section 2 of the Act" (R. 2138).

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[114] The Board straddled the question. It first stated (R. 4) that it was "desirable" to make findings as to the world Communist movement. Then it stated (R. 130) that it was unnecessary to decide whether such findings are required by the Act inasmuch as it had already made them. In its brief below (pp. 61-62), the Board acknowledged that the findings of section 2 are conclusive.

If, as we and the court below interpret the Act, the matter is not one for administrative adjudication, then the Act is palpably unconstitutional as fiat legislation (*supra*, p. 56) On the other hand, if this Court decides that the matter is one for determination by the Board, the decision below must be reversed because the evidence fails to establish the existence of a world Communist movement having the charateristics described in section 2.

Section 2 describes a world Communist movement in terms of (1) its organizational form, (2) the source of its direction and control, (3) its objectives, and (4) the means it employs to achieve these objectives. The record is bare of evidence of the existence of a world Communist movement having any of the four characteristics described in section 2.

Organizational form. Section 2 finds that the world Communist movement referred to therein operates "through the medium of a world-wide Communist organization" (sec. 2(1)), of which the Communist parties of various countries are "sections" (sec. 2(5)) and "affiliated constituent elements" (sec. 2(8)).

The organizational form of the Communist International corresponded to the foregoing description. However, as the Board and the court below acknowledged, that organization was dissolved in 1943 (R. 7, 2137). It has not been succeeded by any organization that corresponds to the Act's description. The Communist Information Bureau, referred to in the Report (R. 7), plainly is not such an organization. As the Board itself found (R. 17), "The exact nature and characteristics of the Communist Information Bureau are not precisely defined on the Record." Moreover, the record discloses that the Bureau is not an organization of the character described in section 2.

First, as the Report acknowledges (R. 17), the Bureau is not a "world-wide organization," but is confined to the Communist parties of eight European countries (R. 1592). The uncontradicted evidence shows that petitioner has

neither membership in it nor dealings with it (*supra*, p. 121). Further, the Record demonstrates that the Bureau is not a centralized organization of which the members (in the words of section 2) are "sections," under the organization's "direction and control." As is shown by the uncontradicted evidence introduced by the Attorney General and relied upon by the Report, the purpose of the Bureau is to provide a medium for "mutual consultation and voluntary co-ordination of action" among the member parties (R. 7). Finally, the testimony of the Attorney General's own witness, Lautner (which the Report ignores), destroys the Board's conclusion. He testified that shortly after the formation of the Bureau, one of petitioner's top officers informed a meeting of petitioner's functionaries that the purpose of the Bureau was not to reconstitute the Communist International, but merely to provide a means for the exchange of experiences and opinions by member parties (R. 937-938, 971).

Direction and control. Section 2(4) finds that the direction and control of the world movement described therein is vested in "the Communist dictatorship of a foreign country."

There can, of course, be no basis for a finding that a world Communist organization presupposed by section 2 is controlled by the Soviet Union, since the evidence negatives the existence of such an organization. Moreover, the record contains no evidence that the Soviet Union or its Communist Party controls the various Communist Parties of the world. On the contrary, the evidence cited by the Board (R. 7), establishes only that the relations of the Communist Party of the Soviet Union and the other affiliates of the Communist Information Bureau are voluntary and consultative.

Objectives. Section 2(2) and (3) describes the objective of the world Communist movement as the establishment of "totalitarian dictatorships," which it defines as one-party

systems of government which suppress all opposition, deny fundamental rights and liberties (including freedom of speech, press, assembly and religion), and maintain control through fear, terrorism and brutality.

Concededly, the Communist Party of each country where capitalism prevails has as its ultimate objective the attainment of state power by the working class and its supporters in that country. The term "dictatorship of the proletariat"—the rule of the working class—was originated by Marx to describe the character of the state under socialism (Tr. 15207-15208; 15513-15515, 16309-16312). In *Schneiderman* v. *United States, supra,* the Court, after examining the same "classical" Marxist literature that is in evidence here, said of the dictatorship of the proletariat (at 142):

> "In the general sense the term may be taken to describe a state in which the workers or the masses, rather than the bourgeoisie or capitalists are the dominant class. Theoretically it is control by a class, not a dictatorship in the sense of absolute and total rule by one individual. So far as the record before us indicates, the concept is a fluid one, capable of adjustment to different conditions in different countries. There are only meager indications of the form the 'dictatorship' would take in this country. It does not appear that it would necessarily mean the end of representative government or the federal system." [115]

The only testimony before the Board as to the attributes of a dictatorship of the proletariat confirms the finding of

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[115] Cf. a recent statement by the Communist Party of Great Britain: "Just as the Russian people won political power by the Soviet road which was dictated by their historical conditions and background of Tsarist rule, and the working people in the People's Democracies and China won political power in their own way in their historical conditions, so the British Communists declare that the people of Britain can transform capitalist democracy into a real People's Democracy, transforming Parliament, the product of Britain's historic struggle for democracy, into the democratic instrument of the will of the vast majority of her people." *The British Road to Socialism* (London, 1952) p. 12.

the *Schneiderman* decision. The testimony of petitioner's witness Aptheker was that freedom of the press and religion and freedom to criticize the policies of the government exist in the Soviet Union and that a multi-party system may continue (as in China and the Eastern European countries) where the Communist Party has won ascendancy, until such time as class antagonisms, and with them the basis for more than one party, disappear (R. 1306-08).

It is apparent therefore that the evidence wholly fails to establish the existence of a world Communist movement having the objectives described in section 2.

Means. Section 2(1) and (11) describes, a world Communist movement which employs espionage, sabotage, terrorism and violence as the means for accomplishing its objectives.

The record is completely devoid of evidence of the means employed by the Communist Parties of countries other than the United States to attain their objectives. It is equally without evidence, and the Board cites none, that petitioner resorts to espionage, sabotage, terrorism, or violence. On the contrary, petitioner's constitution (A. G. Ex. 374) condemns the use or advocacy of violence, and petitioner's witness Aptheker testified without contradiction that adherents of Marxism have always bitterly denounced and fought against anarchistic concepts of terrorism and sabotage, as has petitioner (R. 1265-67). Moreover, the court below did not concur in the Board's conclusion that petitioner advocates violent or other illegal means for the achievement of its objectives. (See *supra*, p. 155).

The petitioner's witnesses testified, without contradiction, that there is no "world Communist movement" as described in Section 2. According to their testimony, a world Communist movement exists today only in the sense that there are Communist Parties in most nations which are independent of one another, but which share a common working-class science and world outlook, and work for the

eventual establishment of socialism in their respective countries by the free choice of a majority of the people of each country. (Tr. 15229-30, 15950, 15137-39).

It is apparent from the foregoing that the finding of the Board that "there exists a world Communist movement, substantially as described in section 2" has no foundation whatsoever in the evidence. This is confirmed by an examination of the grounds upon which the court below relied in affirming the Board's finding.

The court's conclusion was based (R. 2133-37) on its reading of the *Communist Manifesto;* Stalin's *Problems of Leninism* and *Foundations of Leninism;* [116] the *Theses and Statutes* adopted by the Communist International in 1920; and the *Programme of the Communist International,* adopted at the Sixth Congress of that organization in 1928 and superseded by the resolutions of the Seventh Congress in 1935 (A. G. Exs. 125 and 137). From these works the court below found that there is a world Communist movement having the following characteristics: (1) The movement has as its ultimate objective "a classless, stateless society ruled by the proletariat of the world." [117] (2) "The basic concepts of this ultimate objective are that the sole value is labor and that capitalism and nationalism are merely means for exploiting the masses of workers." (3) The program of the movement "calls for a small hard core of revolutionaries, formed into a disciplined Party in every country," which is to attain control of the government in order to destroy its present form and ultimately weld it into the stateless world society. (5) In the interim period, the Soviet Union, being the first and so far biggest govern-

[116] The American editions of these works of Stalin which were introduced were published in 1934 and 1932, respectively. They were written in 1926 and 1924, respectively, A.G. Exs. 138, 121.

[117] The court does not explain how there can be a proletariat, which by definition is a class, in a classless society, or how it can rule in a stateless society.

ment under Communist control, "must be protected and preserved as Communistic at any cost" (R. 3137-38).

Accordingly, the court below found that there is a world Communist movement in the sense that there are Communist parties in various countries which base their program and activities on a common economic and political outlook, and work toward the ultimate achievement of a common social goal—a universal, classless, stateless society.

The movement found by the court lacks all of the essential characteristics attributed to *the* world Communist movement described in section 2 and palpably is not the movement postulated by that section. Accordingly, if this Court concludes that Congress left this issue for determination by the Board, the decision below must be reversed for a complete failure of proof.

III. The Findings of the Board Are Based on Incompetent and Discredited Evidence and on Misrepresentation of the Evidence.

The case for the registration order, such as it is, rests on the testimony of witnesses whose unreliability was thoroughly established. The Attorney General paraded to the stand some of the most notorious professional witnesses on the current scene, including Budenz, Matusow, Crouch, Manning Johnson, Gitlow, and Markward. The Department of Justice must have known that many, if not all, of these witnesses were unworthy of credence. As the record shows, the testimony of at least three of them had been rejected as false in prior proceedings.[118] One witness had

[118] Honig's testimony was rejected by Judge Sears, the presiding officer in the first Bridges deportation case (Tr. 6439-40). In the recent perjury prosecution of Harry Bridges, the Ninth Circuit rejected the testimony of Johnson and Crouch that Bridges had attended a Communist Party convention, because unimpeachable documentary evidence established that the alleged attendance was impossible. See *Bridges* v. *United States*, 199 F. 2d 811, 841.

previously admitted committing perjury in appearances for the government, and had declared (and reiterated in this proceeding) a readiness to continue doing so.[119] Another had on several occasions, while a government witness, given perjured testimony (repeated in this proceeding) as to her financial arrangements with the Department of Justice, in order to pose as an unpaid patriot.[120] Another witness (Matusow) was known by the Department of Justice to be psychoneurotic.[121] Still another gave a false version of a conversation which contradicted testimony given by him as a government witness a few weeks before.[122]

Ten of the Attorney General's witnesses [123] had been paid spies for the F.B.I. while in the Party.[124] Seven of the nine other ex-Communist witnesses were also professional anti-Communists, in the sense that they derived all or a substantial portion of their income from anti-Communist activities, testimony, and writings.[125] Three of them were at the time of testifying employees of the Department of

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[119] Manning Johnson (R. 669-74).

[120] Markward (R. 201-05, 734-35).

[121] See testimony of Assistant Attorney General Tompkins in Hearings before Subcommittee of Committee on Appropriations, H.R. 84th Cong., 1st Sess., on Department of Justice Appropriations for 1956, pp. 294-5.

[122] Daniel Scarletto (R. 1091-92).

[123] The Attorney General called twenty-two witnesses, of whom nineteen had once held membership in the Communist Party. The other three witnesses were Mosely, whose testimony related solely to "non-deviation" (see *supra*, p. 137), and two persons who translated or identified a few documents (R. 134-36).

[124] The Board's Report lists nine as "witnesses who joined or rejoined" petitioner "as a result of conferences with the Federal Bureau of Investigation" (R. 134-35). In addition to these, however, Matusow admittedly spied for the F.B.I. while in the Party (Tr. 1295).

[125] Budenz (Tr. 13968-87); Crouch (Tr. 5782-4); Gitlow (Tr. 2609, 2645-6); Johnson (Tr. 7293-7); Kornfeder (Tr. 3469-70, 3477); Lautner (Tr. 1985-92); Nowell (Tr. 4515-7).

Justice.[126] Some of the nineteen former members admitted spying for the F.B.I. on other organizations, including labor unions.[127] Some admitted that they had informed on relatives and friends and on persons whom they, while agents of the F.B.I., had induced to join or evidence interest in the Party.[128]

Subsequent to the hearing, one of the Attorney General's witnesses (Matusow) admitted a series of perjuries and two others (Crouch and Manning Johnson) had their unreliability so publicly exposed that the Department of Justice has stopped using them as witnesses (see *infra*, p. 212). Still others have in various ways been thoroughly discredited.[129]

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[126] Lautner, Nowell, Johnson (see references in preceding footnote). In addition, Crouch had been under contract with the Immigration and Naturalization Service for appearance as a witness in 15 deportation cases (Tr. 5208, 5786).

[127] Janowitz (Tr. 12837-8, 12858-63); Philbrick (Tr. 8130-1, 8135-7, 8141-2); Scarletto (Tr. 13551).

[128] Markward, a well-paid spy for the F.B.I. inside the Party (R. 201-05), solicited subscriptions to the Daily Worker in Negro neighborhoods by explaining that the paper supported equal rights for Negroes. Then she reported to the F.B.I. the names of those whom she had induced to subscribe (R. 751-52). She also reported to the F.B.I. the names of persons she recruited as members of the Communist Party by telling them of its work against racial discrimination (Tr. 7812-14). Cummings, while an F.B.I. spy, induced relatives and fellow factory workers to join the Party; then he reported the names of his recruits to the F.B.I. (Tr. 11011, 11021-4). As to Blanc, see Tr. 8560.

[129] E.g., Gitlow recently testified that among "the ministers who carried the instructions of the Communist Party or collaborated with it" were Rabbi Stephen S. Wise, Rabbi Judah L. Magnes, Rev. John Haynes Holmes, and other eminent clergymen (Hearing before Comm. on Un-American Activities, H.R. 83rd Cong., 1st Sess. July 7, 1953, p. 2077). Markward's identification of Annie Lee Moss as a member of the Communist Party was rejected by the Department of Defense (N. Y. Times, Feb. 24, 1954, p. 1; Jan. 20, 1955, p. 1). Secretary of State Dulles rejected Budenz' positive identification of John Carter Vincent as a member of the Communist Party (Hearings before Internal Security Subc. of Comm. on Judiciary, Sen., 82d Cong., 1st Sess. pt. 2, p. 625; N. Y. Times, March 5, 1953, p. 8).

Cross-examination of the Attorney General's witnesses developed not only their general unreliability, but also that their testimony in this proceeding was shot through with fabrications. The Board stated that "we have considered and resolved the inconsistencies in the testimony of certain of [the Attorney General's] witnesses" (R. 3). This is not true. The Board not only failed to consider the damage done to the credibility and reputation of the Attorney General's witnesses, but also relied heavily on testimony proven to be false and in some cases repudiated or withdrawn by the witness himself. It ignored all testimony of the Attorney General's witnesses which was favorable to petitioner, relied on obviously incompetent evidence, and attributed to the Attorney General's witnesses testimony which they did not give. Its only standard for the acceptance or rejection of evidence was whether or not it supported (by the Board's irrational criteria) the preconceived conclusion.

To illustrate our assertions within reasonable space limits, we will deal with the findings on five subjects which are given major significance in the Report.

Petitioner's Disaffiliation From the Communist International.

Petitioner disaffiliated from the Communist International at a special convention held in November 1940 (R. 13). One of the major props of the Report is that this disaffiliation "did not alter in any substantive way" petitioner's relationship with the International (R. 14, 6, 130).

The only evidence which can support this finding was testimony by the notorious Paul Crouch. Crouch testified that Earl Browder told a meeting of petitioner's leaders, held in connection with the 1940 disaffiliation convention, that the actual relations between the two organizations "would remain exactly the same in the future as they had in the past" (R. 422). The Report accepts this testimony

(R. 14). It ignores the testimony of petitioner's witness, Miss Flynn, that in fact the relations between the two organizations terminated in 1940 (R. 1286). Yet Miss Flynn's testimony was not only uncontradicted, but was confirmed by the complete absence of evidence of communications or dealings between the organizations after the disaffiliation. The Report also conceals the fact that cross-examination revealed that Crouch had never previously testified to Browder's alleged statement in his innumerable appearances as an anti-Communist witness (R. 5534-5601). Finally, the Report suppresses the fact that Crouch's story was directly contradicted by the Attorney General's own witness, Lautner, as well as by Miss Flynn, both of whom attended the leadership meeting referred to by Crouch (R. 991-993, 1284-1286; C. P. Ex. 13).

The Reconstitution of the Communist Party.

In 1944, under the leadership of its former general secretary, Earl Browder, the Communist Party was dissolved and the Communist Political Association formed to succeed it. Thereafter, in 1945, believing that this action was erroneous, American Communists reconstituted the Communist Party at a convention held in July (R. 15).

In April 1945, Jacques Duclos, a French Communist leader, published an article in France which sharply criticized Browder's policies and the dissolution of the Communist Party. The article is addressed to French Communists as an answer to questions raised by many of them regarding developments in America (A. G. Ex. 208, p. 656). Some years later, Duclos informed Miss Flynn that he wrote the article to convince those French Communists who favored applying Browder's policies in France of the error of the latter's views (R. 1280). The article first came to the attention of American Communists in May, 1945, as a result of a news dispatch in the New York World Telegram (R. 1291).

The Report finds that "the facts directly surrounding the reconstitution are indicative of foreign domination and control of [petitioner]" (R. 16). It finds that prior to the appearance of the World Telegram story, Dmitri Manuilsky, a Soviet delegate to the San Francisco U. N. Conference, "sent word to [petitioner] to the effect that it should heed Duclos' statement concerning the reconstitution of the Communist Party" (R. 60). These findings rest on a distorted version of hearsay testimony given on direct examination by Budenz, who was the only government witness to testify on the subject, and which itself was exposed as a fabrication.

On direct examination, Budenz testified that early in May 1945, and prior to the receipt in this country of any information as to the existence of the Duclos article, he hastily read one-third of a letter from Joseph Starobin, the Daily Worker correspondent in San Francisco. Over petitioner's objection to this hearsay, Budenz was permitted to testify that the letter reported that Manuilsky had expressed indignation that petitioner had not criticized U. S. Government officials more severely and that it should "observe more carefully the guidance and the counsel of the French Communists" (R. 1136-1137).

Contrary to the Report, therefore, Budenz did not quote Manuilsky as mentioning Duclos' article or as saying anything about reconstituting the Communist Party.

Moreover, the Report ignores the fact that cross-examination established that Budenz had given two earlier versions of the alleged Starobin letter, which were contradictory of his testimony before the Board as well as of each other (R. 1182-1185).[130] The Report also ignores

[130] Budenz testified that he had made a report of this story to the F.B.I., but was unable to state with which, if any, of his three public versions it was consistent (R. 1184-85). Petitioner thereupon moved for the production of this report by the Attorney General (R. 1185). Under the authorities, it was clearly entitled

petitioner's testimony that the reconstitution of the Party was the product of an independent decision of the American Communists, based on their own experience, though undoubtedly influenced by Duclos' analysis (R. 1292-1296).

In an effort to build up its false thesis that the Duclos article was a Moscow directive, the Report finds that Duclos had been in Moscow shortly before the article was published (R. 16). This finding is based on testimony which was stricken at the suggestion of counsel for the Attorney General when cross-examination developed that it was obviously erroneous (R. 858-59).

Force and Violence.

The Report finds that petitioner advocates the violent overthrow of the Government (e.g., R. 44, 121).[131] Most of the "documentation" of this finding consists of fragments of the writings of Marx, Engels, Lenin, and Stalin, which were given a contrary interpretation in *Schneiderman* v. *United States, supra.* In addition, the Report supports its finding on this subject by references to the testimony of Honig, Johnson, Meyer, Matusow, Scarletto, and Budenz among others (R. 121).

Both Honig and Johnson so testified on direct examination. The Report, however, ignores their contrary testimony on cross-examination.

Cross-examination of Honig developed that, throughout his membership in the Communist Party from 1927 to 1939,

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either to the report, or to have the witness' testimony on the matter disregarded. *Gordon* v. *United States*, 344 U. S. 414; *United States* v. *Krulewich*, 145 F. 2d 76, 78; *Christoffel* v. *United States*, 200 F. 2d 734, 738; *Edwards* v. *United States*, 312 U. S. 473, 479; *United States* v. *Grayson*, 166 F. 2d 863, 870. The motion was denied by the Panel (R. 1185) and its action affirmed by the Board (R. 128). For this reason alone the Board erred in making findings on the Budenz testimony.

[131] As we have seen (*supra*, p. 155), the court below did not accept this proposition.

he believed and petitioner taught that when a majority of the American people were ready to do away with capitalism and establish socialism, they would be so strong and make their desire so plain that there would be no need for violence. Violence would be required only if the capitalists forcibly attempted to suppress the people's desire for change (R. 504-06).

Cross-examination of Johnson showed that petitioner taught that "overthrow" of the government would not necessarily involve violence, but referred only to a fundamental change in the economic system by the substitution of socialism for capitalism (R. 675-77). Cross-examination further developed that petitioner taught that it would not "attempt a revolution" until it had first won the support of a majority of the American people (R. 677).

Meyer said nothing to support the Board's finding. Matusow gave conflicting testimony on this issue (as on almost every other question on which he was examined), including testimony that petitioner taught in 1949 that socialism would be brought about "by evolution or revolution" (R. 1053-54).

The Budenz testimony relied on by the Report is a rendition of a purported 1940 statement of Eugene Dennis on turning "'imperialist war' into civil war" (R. 114, 127). The Report conceals the fact that in 1946, five years closer to the event, Budenz had given a contradictory version of the same alleged conversation. As then testified to, the conversation had nothing to do with force and violence or fomenting civil war (R. 1178-80).[131a]

The testimony of Scarletto was that at a local Party club meeting in 1950, the club chairman and members urged enlistment in the armed forces for the purpose of sabotaging

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[131a] Mr. Joseph Alsop has aptly described the Budenz memory as "characterized by a remarkable built-in pick-up, the faculty for recalling today what was not recalled last year." *N. Y. Herald Tribune*, Sept. 14, 1951.

the Korean war (R. 47). The Report accepts this testimony without mentioning the fact that only a few weeks earlier the witness had given an entirely different account of the same incident when he testified under oath as a government witness in another proceeding. His testimony on that occasion was that it was he alone who proposed entering the armed services for the purpose of sabotage (R. 1091-92). Thus the Report attributes the advocacy of sabotage to petitioner and its members when the evidence shows that, if it occurred at all, it was the act of an agent provocateur.[132]

Equally blatant is the Report's concealment of the testimony of the Attorney General's witness Lautner on this issue. Lautner was a member of the Communist Party from 1927 until his expulsion in 1950, and was the only one of the Attorney General's witnesses who held an official Party position of any consequence subsequent to 1945 (R. 135). Lautner did not testify that petitioner advocated force and violence at any time during his twenty-three year membership. On the contrary, he conceded that at the time he left the organization in 1950, petitioner taught and advocated the peaceful transition to socialism (R. 979-80, 983-84, 986-88; C.P. Ex. 55, pp. 6-7; C.P. Ex. 58, pp. 125-28).

Financial Aid.

The Report's findings on the issue of financial aid are drawn largely from the direct testimony of Gitlow, Budenz, and Matusow.

The Report finds that in 1949, the petitioner through International Publishers received from the Soviet Union book

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[132] Furthermore, Scarletto admitted that the account of the incident which he gave in this proceeding was contradictory to his report of the same incident to the F.B.I. (R. 1092). Yet the panel denied petitioner's motion for production of this report (*ibid.*), and the Board affirmed its ruling (R. 128). It was therefore clear error for the Board to rely on the contradicted testimony (see *supra*, p. 204, ftn. 130).

plates, English translations of books, and page proofs, all without charge (R. 88). This finding is a misrepresentation of hearsay testimony of Matusow. He was permitted to testify over objection that in 1949 the head of International Publishers told him that that company had received such materials at some undisclosed time in the past (R. 1036-37). There is nothing in Matusow's story to establish the date on which the materials were received. Nor is there anything to suggest that petitioner was aware of or benefited by the transactions. Matusow has since confessed that his story was an invention. *False Witness* (1955), pp. 101, 102.

The Report's finding that in 1928 an American trade-union delegation to the Soviet Union was organized at the direction of, and financed by, the Communist International (R. 187) is based upon testimony of Gitlow which was conclusively proved to be a fabrication by his own admissions on cross-examination and by documentary evidence. To give only one example, he testified on direct that the technical staff of this delegation consisted entirely of Communists. He had to change this feature of his story when confronted with documentary evidence that the technical staff consisted of well known non-Communists, including Paul H. Douglas (now a United States Senator), Rexford Guy Tugwell, Stuart Chase, and George S. Counts. (Cf. R. 233-34, 273, with R. 273-78 and C. P. Ex. 1.)

The findings that the Communist International furnished "substantial" sums to petitioner in connection with the 1928 presidential campaign, a 1929 factional dispute, and work in the United Mine Workers (R. 86-7), are likewise derived from Gitlow's direct testimony. On cross-examination it was shown that in prior writings and testimony Gitlow had given three different and mutually contradictory versions of these alleged incidents and the amounts involved (R. 283-295), so that, for example, the amount allegedly supplied in connection with the 1929 factional dispute varied from $50,000 to "upwards of $1,000,000" (R. 291-95).

The finding that in 1939 petitioner's treasurer stated that Soviet funds were not then available for the *Daily Worker* (R. 88), is based on testimony of Budenz. But the Report fails to mention that this was another newly-[illegible] episode which was never before mentioned by Budenz in his numerous prior appearances and copious writings (R. 1180-81), and which was belied by Budenz' testimony before a Senate Committee that he had no knowledge that petitioner had ever obtained any funds from Soviet sources (R. 1182).

The findings that about 1940 the *Daily Worker* received news dispatches from Runag free and that petitioner caused false registration statements to be filed with the State Department misrepresenting this relationship (R. 88, 106) are based on testimony of Budenz. Budenz' direct testimony on these matters was proven to be a mass of falsehoods by documentary evidence and by the changes in his direct testimony when cross-examined. (See R. 1168-73, 1191-98; C. P. Exs. 70-75, inclusive.)

Representatives of the Communist International.

The Report identifies J. Peters and Gerhart Eisler as one-time representatives of the Communist International who were "active in the United States after 1940" (R. 60). It thus insinuates that Peters and Eisler were a source of foreign control over petitioner subsequent to petitioner's disaffiliation from the Communist International in 1940. The record exposes the falsity of the insinuation.

The identification of Peters as a representative *from* the Communist International is a misrepresentation of testimony by the Attorney General's witness Nowell that in the early 1930's Peters was *petitioner's representative to* the Communist International (R. 399).[138]

[138] In its brief below (p. 141), the Board acknowledged the Report's erroneous description of Peters.

Evidence to the effect that Eisler was a representative of the Communist International was confined, with the exception of some Budenz testimony, to the period before 1936 (R. 320-25, 660-61, 692-93, 874).

The Attorney General's evidence showed that Eisler left the United States in that year (R. 656). Uncontradicted testimony offered by petitioner showed that Eisler's return to this country in the early 1940's was not on any mission to petitioner. He came here as an anti-fascist refugee in transit to Mexico, but was prevented from reaching his destination by the U. S. immigration authorities, who kept him in the United States against his will (R. 1300-01).

The only testimony linking Eisler to the Communist International after his departure from the United States in 1936 came from Budenz. This was flimsy hearsay, as is revealed by the Board's own statement that Budenz testified "that there was talk of Eisler as a Comintern representative in 1945" (R. 60). In addition, this hearsay was exposed as a typical Budenz invention. For it was shown that the witness had failed to make any such identification when he appeared in 1949 as a witness in the trial of Eisler for perjury, where the latter's alleged connection with the Communist International was a material issue (R. 1187-91; *Eisler* v. *United States*, 176 F. 2d 21, 23, 25).

When dealing with petitioner's witnesses the Board adopted an entirely different standard from that it employed for the professional informers upon whose false testimony it enthusiastically relied. The testimony of petitioner's witnesses was ignored or disbelieved even when in all substantial respects it was uncontradicted. Two examples will illustrate the Board's technic.

The Report "discounts" uncontradicted testimony of Gates because of his claimed arrogance toward counsel for the Attorney General (R. 17-18). The Report does not explain why it rejects testimony to the same effect by Miss

Flynn (*ibid.*), which it does not "discount." Moreover, the Report consistently relies on testimony of the Attorney General's witness Kornfeder. Yet he acted so arrogantly, not only to counsel but also to the then chairman of the panel, that a majority of the panel found his conduct contemptuous (R. 340-44). Needless to say, the Report suppresses this episode.[134]

Another example of the Board's double standard it its disparagement of petitioner's witness Aptheker. To illustrate a point in his testimony, Aptheker referred to an incident when Frederick Douglass, arrested for an attempt to escape from slavery, falsely denied the charge. Aptheker expressed the opinion that Douglass was the moral person and the committing magistrate the immoral person in this incident (R. 1314-16). The Report grasps at this statement to impeach Aptheker by asserting that it "is indicative of a viewpoint that might permit his conscience to misstate facts if they did not favor his side" (R. 39).

This reasoning, fanciful enough in itself, is fantastic in the light of the Report's suppression of the numerous instances in which the Attorney General's witnesses not only "might" but did "permit" their consciences to misstate facts and of its acceptance of the testimony of Manning Johnson despite his admission that he had previously given perjured testimony and was ready to do so again (see *supra*, pp. 199-200).

The Board's application of a double standard of credibility and its reliance on tales of the remote past demonstrably concocted by disreputable professional informers require that the registration order be set aside as unsupported by the evidence.

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[134] In addition, the Report relies on an exhibit, identified by Kornfeder on direct examination, as a publication of petitioner's establishing its adoption of the "twenty-one points" for affiliation to the Communist International (R. 12), notwithstanding the fact that, on cross examinaion, the witness conceded that his identification had been erroneous and that the publication was not petitioner's (R. 349-51). The court below also made the mistake of relying on this exhibit (R. 2139).

IV. The Court Below Erred in Denying Petitioner's Motion for Leave to Adduce Additional Evidence.

While this proceeding was pending before the court below, petitioner moved pursuant to section 14 of the Act for leave to adduce additional evidence before the Board.[135] The motion and supporting affidavit in substance stated and offered to prove that subsequent to the conclusion of the proceeding before the Board two of the Attorney General's principal witnesses, Crouch and Johnson, committed perjury in other proceedings [136] and that a third, Matusow, admitted a course of perjury.[137] The moving papers further stated that because of the public disclosure of the perjury of these three informers, the Attorney General had ceased to employ them as witnesses (R. 2053-66).[138]

Petitioner's motion and affidavit further showed from an analysis of the Report that in numerous instances the Board had rested material findings of fact adverse to petitioner in whole or in part on the testimony of these three witnesses (R. 2056, 2065-66).[139]

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[135] Section 14 provides for the granting of such a motion upon a showing "to the satisfaction of the court that such additional evidence is material."

[136] Johnson before the International Organizations Loyalty Board in a proceeding with respect to Dr. Ralph J. Bunche; Crouch, in *U. S.* v. *Kuzma*, a Smith Act conspiracy prosecution in the Eastern District of Pennsylvania, and *Matter of Jacob Burck*, a deportation proceeding (R. 2059-63).

[137] These admissions were made to Bishop G. Bromley Oxnam and to Messrs. Russell Brown and Robert Norvall, law associates of former Attorney General J. Howard McGrath (R. 2063-64).

[138] As petitioner's affidavit also shows, the cross-examination of these three informers in their appearance before the Board had developed a pattern of false testimony both in this proceeding and, in the case of Crouch and Johnson, in prior proceedings (R. 2058).

[139] The Board's annotated version of the Report reveals that the Board supported its findings of fact with 36 separate references to

Subsequent to the decision below, Matusow, by affidavits and from the witness stand, recanted as perjurious his testimony in two other proceedings (*U. S.* v. *Jencks*, D. C., W. D. Tex.; *U. S.* v. *Flynn et al.*, D. C., S. D. N. Y..).[140] In addition, Matusow has written and published a book, *False Witness*, in which he details numerous instances in which he gave false testimony under oath, including (pp. 101-102) his testimony before the Board in this proceeding. Finally, the Board recently ruled that it would disregard all of the testimony of Matusow in another proceeding before it because of the admissions made by him to Bishop Oxnam and Mr. Brown. Report of the Board, *Brownell* v. *Labor Youth League*, No. 102-53, pp. 4-5.

The Board filed no counter affidavit in opposition to petitioner's motion. It opposed the motion, which it analogized to a motion for a new trial, on the ground that there was no showing that the additional evidence would probably change the result, and asserted that the Board could have ignored the testimony of the three witnesses *in toto* without altering its ultimate conclusion. It further urged that the motion should be denied because the additional evidence went only to the issue of credibility. (R. 2067-76.)

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the testimony of Crouch, 25 to the testimony of Johnson, and 24 to the testimony of Matusow (R. 2065-66). To cite but four examples: Matusow's is the only testimony relied on by the Board to support its findings that petitioner advocated the violent overthrow of the government in the post-Act period and that it received foreign financial aid subsequent to 1940 (R. 2022, 1964). The Board's key finding that petitioner's 1940 disaffiliation from the Communist International was spurious is based on the testimony of Crouch (R. 1829, 1814, 2038). And the Board relied heavily on the testimony of Johnson for its findings with reference to the authority over petitioner exercised by alleged representatives of the Communist International (R. 1911, 1974, 2030, 2032).

[140] After a hearing in the *Jencks* case, the District Court denied a motion for a new trial based upon Matusow's perjurious testimony. The court in the *Flynn* case on April 22, 1955 granted a new trial to two of the defendants.

The court below denied petitioner's motion without opinion, Judge Bazelon not participating.

The action of the court violated section 14 of the Act. The Board's analogy of a motion under that section to a motion for a new trial is faulty. A motion under section 14 need not establish that the new evidence *will probably* change the result. All that need be established is that such evidence "is material"—i.e., that it *might* change the decision made by the agency.[141] Clearly, the original testimony of the three informer witnesses in question was material since, as appears from the Report, the Board relied on it extensively in making subsidiary findings of fact. The additional evidence proffered by petitioner would have destroyed the credibility of this testimony.[142] Obviously, therefore, the additional evidence was itself material.

The decision below is contrary to the decision of this Court in applying a similar provision of the National Labor Relations Act. *NLRB* v. *Indiana and Michigan Electric Co.*, 318 U. S. 9 There the additional evidence sought to be adduced went to the credibility of three witnesses whom, in the words of the Court (at 20), "the Board's staff thought useful to call, and on whom the examiner plainly relied." Despite the Board's denial that it had relied on the testimony of these witnesses and its statement to the Court that it was willing to omit their testimony from the record, the Court held that the motion to adduce had been correctly granted because the additional "evidence, if taken, *might* change the result." (At 23,

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[141] Section 14 omits the usual requirement that the applicant show grounds for not having adduced the additional evidence in the administrative proceeding. In any event, it is undisputed that all the additional evidence relied on by petitioner developed subsequent to the agency hearing and most of it subsequent to the submission of the case to the court below (R. 2054).

[142] The Board acknowledged as much in the case of Matusow, in ruling that it would disregard all of his testimony in the *Labor Youth League* case. See *supra*, p. 213.

emphasis supplied.) The Court further said (at 28): "The statute demands respect for the judgment of the Board as to what the evidence proves. But the court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed."

So here the findings of the Board cannot be said to have been fairly reached unless it hears and weighs the evidence impeaching the three witnesses whose testimony the Attorney General believed to be material and upon which the Board heavily relied. The Board's protestation that it could have ignored the testimony of these witnesses *in toto* and reached the same result, like the similar protestation of the National Labor Relations Board, is therefore unavailing.

Petitioner's motion presents an issue of great public importance. The reckless use by the Department of Justice of professional informers in "security" cases is compromising the administration of justice. It has aroused widespread apprehension and alarm, particularly in the light of current revelations of the untrustworthiness of testimony which the government has bought and paid for. As has recently been stated (*N. Y. Times* editorial, July 8, 1954):

> "If the Department of Justice feels it essential to use informers in the anti-Communist prosecutions under the law, it has the unmistakable duty to follow up relentlessly any indication that they may not be telling the truth. As the law enforcement agency of our government, the Department of Justice has a primary obligation to maintain its own integrity and that of its agents." [143]

[143] Cf. the recently televised statement by the Attorney General that when one of the government's informer witnesses is found to be unreliable, "then it is the government's obligation to follow up to see

When the Department of Justice and administrative agencies are derelict in this obligation the courts should be scrupulous to enforce it by insisting, at a minimum, that the evidence of perjury be heard and considered. So much, at least, is required if the abuse of the judicial process through the use of hired informers is to be curbed and the liberties of individuals and organizations safeguarded against false testimony. The failure of the court below to take this minimal action requires a reversal.

CONCLUSION

The Act and the order of the Board are the extreme product of an environment that has spawned a host of governmental and extra-governmental measures alien to the American tradition. In the name of national security, violence has been done to the Bill of Rights and deep inroads have been made in our freedom. Unless arrested, this process threatens to take us down the road to a police state.[144]

Current assaults upon democratic liberty were initiated on the premise that it was necessary for the protection of

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that he is punished and that anybody who has been hurt by his testimony, if it's false, is given a new chance." *New York World-Telegram*, March 28, 1955.

[144] As the General Council of the Presbyterian Churches declared in its Letter to Presbyterians, *supra*: "Under the plea that the structure of American society is in eminent peril of being shattered by a satanic conspiracy, dangerous developments are taking place in our national life. Favored by an atmosphere of intense disquiet and suspicion, a subtle but potent assault upon basic human rights is now in progress. * * * Treason and dissent are being confused. * * * A great many people, within and without our government, approach the problem of Communism in a purely negative way. Communism, which is at bottom a secular religious faith of great vitality, is thus being deal with as an exclusively police problem. * * * In the case of a national crisis this emptiness could in the high-sounding name of security, be occupied with ease by a fascist tyranny."

the nation to make Communists the objects of repression. Events, however, have confirmed the inexorable lesson of history that repression cannot be contained. The exceptional measures invoked against Communists have inevitably resulted in the abridgment of the liberties of non-Communists. This has been the experience in almost every area of national life, including government service, private industry, the trade union movement, the clergy, the bar, the arts, the entertainment world, and all forms of voluntary association. Because of their ideas or associations,[145] thousands of individuals have been prosecuted, dismissed from their jobs, blacklisted, ostracized, barred from public platforms, deported, denied the right to travel abroad, or (if foreigners) excluded from the country. No one professing political opinions short of extreme reaction can be confident that he is immune.[146] Even more alarming than the victimization of a growing number of individuals are the pervasive restraints upon the expression of opinion, the burning of books, and the creation of what has been called "the ministry of fear in our country."[147]

Recent months have witnessed some reaction against the departures from fundamental constitutional principles in

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[145] Guilt by association "appeared in our law only in 1940; since then it has grown and spread until this cloud, no larger than a man's hand, covers the whole horizon." *Civil Liberties under Attack* (*A Symposium*) (Univ. of Pa. Press, 1951), p. 17. The doctrine is no longer confined to physical or organizational association, but has been extended (as in the Act and section 5 of the Communist Control Act) to include what may be called guilt by association of ideas.

[146] As Professor Henry Steele Commager recently wrote: "We are all members of many societies, and we may say with John Donne when the principle of association is attacked we ask not for whom the bell tolls, it tolls for us. * * * Just as each new party that came to power during the French Revolution thought it essential to send its predecessors to the guillotine for the lack of true zeal, so the hatemongers of our day are spreading their nets wider and wider until in the end hardly anyone can escape." *Guilt—or Innocence—by Association*, N. Y. Times Magazine, Nov. 3, 1953.

[147] Averell Harriman, quoted in N. Y. Post, May 5, 1953.

matters allegedly touching the national security.[148] But a return to the firm ground of the Bill of Rights will be long postponed if the Act and the order of the Board are sustained. Such a decision would freeze into law the worst excesses of the current hysteria and would create the conditions and supply the tools for a vast extension of repression.

The passage of the Act in itself stimulated and was used to justify further inroads on civil liberties, including the enactment of parallel legislation by state and local governments. Moreover, the threat of its implementation against petitioner and an indeterminate number of other organizations gave a powerful impetus to the growth of fear, inhibiting association and expression.

The immediate effect of the Board's order, if allowed to stand, will be to proscribe all of the advocacy of the Communist Party and subject its members to intolerable sanctions. It will bar Communists from lawful political activity; thus invading the prerogative of the electorate. It

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[148] "There seems little doubt that the atmosphere has been improving in this respect for some time now. There is still plenty of room for further improvement, but the trend is in the right direction —away from exaggerated fears and toward a more reasoned understanding of the balance that must be achieved between national security and individual liberty." New York Times, editorial, June 25, 1955. "When the outgoing president of the American Bar Association is cheered as he calls for a "bloodless revolution" to be led by lawyers to restore our "ancient liberties," there is no doubt that the times have changed. We are in the early stages of a great popular reaction against the hysteria and the demogoguery, the lawlessness and the cruel injustices which we call quite rightly the era of McCarthyism. * * * The great majority of the leaders of American opinion are no longer willing to stand for the theory that espionage, sabotage and subversion can be dealt with only by ignoring the Constitution, and by conniving at what is nakedly and simply lynch law. * * * The ultimate reason for the change is, I believe, the enormous emotional relief which has come since all the great powers have acknowledged publicly that there is no alternative to peace, that they cannot contemplate war." Walter Lippman, N. Y. Herald Tribune, August 25, 1955.

will also lay the foundation for mass prosecutions of petitioner's members for failure to comply with the impossible requirement that they publicly declare that they are criminal conspirators and expose themselves to the Act's intolerable sanctions. For all practical purposes, a final order of the Board will outlaw the Communist Party and make membership in it a crime.

This is the first time in our history that the Communist Party or any other group has been outlawed by federal legislation. No other major democracy outlaws Communists. Only the government of the United States, the most powerful capitalist nation, which proclaims leadership of the free world, asserts that such a measure is necessary for the national safety and compatible with a democratic society.[149]

If the Act and the order of the Board are sustained, the civil and criminal penalties imposed for membership in petitioner will be extended to persons who are not members by any conventional or rational standards. The all-embracing criteria of membership contained in section 5 of the Communist Control Act will jeopardize the livelihood and liberty of countless non-Communists. Such persons as Oppenheimer, Vincent, Davies, Ladejinsky, Condon, Lattimore, Peters, and many thousands of lesser prominence will be natural targets for the civil disabilities imposed on "members" of petitioner and for prosecution upon their failure to register as such.

If the order of the Board becomes final, it will lay a foundation for governmental proscription of many organizations other than petitioner and for the imposition of the

[149] Mr. Justice Douglas has observed that America's "growing tendency in the interest of security to take short cuts, to disregard the rights of the individual, to sponsor the cause of intolerance, and to adopt more and more the tactics of the world forces we oppose * * * have helped lose for America the commanding position of moral leadership which we had at the end of World War II." Address to the American Law Institute, *New Republic*, Nov. 16, 1953.

Act's sanctions against their members. The Board has already ordered two organizations to register as Communist fronts, and proceedings are pending against nine others on the same charge.[150] In addition, the Attorney General recently instituted the first of an announced series of proceedings before the Board to have trade unions declared "Communist-infiltrated." [151]

The number of front and infiltrated organizations can and undoubtedly will be multiplied almost indefinitely in the light of the comprehensive criteria of sections 13(f) and 13A(e).[152] Moreover, if the present categories of organizations prove too restrictive, additional categories can and inevitably will be created. Having moved from action and front to infiltrated organizations, the Act can readily be extended to groups which are "contaminated", "tainted", "tinged" and finally "politically unreliable".

If the Constitution should be held to authorize the proscription of petitioner, there would remain little room for constitutional objections to the application or extension of the Act to almost any other organization. Moreover, the techniques employed against petitioner by the Board, if allowed to stand, will be available for the destruction of

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[150] The organizations ordered to register are the Jefferson School of Social Science and the Labor Youth League. The names of the organizations against which Board proceedings are pending indicate the diverse nature of their activities: Civil Rights Congress, American Committee for the Protection of Foreign Born, Council on African Affairs, Washington Pension Union, National Council for American-Soviet Friendship, Veterans of the Abraham Lincoln Brigade, United May Day Committee, California Labor School, American Peace Crusade.

[151] *Brownell* v. *International Union of Mine Mill and Smelter Workers*, Docket No. 116-56. As appears from the petition, the union was founded in 1893, and is composed of workers in nonferrous metal mining and processing whom it represents as bargaining agent under the National Labor Relations Act.

[152] For illustrations of these criteria in operation, see *supra*, p. 118, ftn. 57; p. 136, ftn. 76.

virtually any group whose views are not governmentally approved. A decision sustaining the Act and the order of the Board would give judicial approval to governmental licensing of all voluntary associations formed to promote political, economic or social objectives.

The invalidity of the Act and the order of the Board are urged here by the Communist Party. But the fundamental issue at stake is the survival of the Constitution, not the Communists. The Act and the Board's order cannot be sustained without validating the premises on which they rest. These are coerced conformity, suppression of peaceable advocacy and assembly, imputation of guilt by association, conviction by legislative fiat, trial by a biased tribunal, judgment on the basis of irrational and vague standards, and reliance on the testimony of professional perjurors. If these execrable policies—condemned here and abroad as "McCarthyism"—may lawfully be applied to petitioner, they will inevitably be extended to the people as a whole. Indeed, the techniques which the Act and the Board employed against petitioner have only recently been used to indict four Democratic administrations and the present Republican administration for "twenty-two years of treason," to impugn the loyalty of two former presidents, and to impeach the integrity of the foreign service and the armed forces.

The proponents of the Act advance the spurious justification that its suppression of democratic liberties is necessary to protect the national security against the menace of Communism. The fact is, however, that the Act is a supreme example of the truth of the statement that, "Security is like liberty, in that many are the crimes committed in its name." *Knauff* v. *Shaughnessy*, 339 U. S. 537, 551.

The Act does not protect but undermines the national security. It destroys the values most essential to be secured and on which our security rests. Mr. Chief Justice Hughes observed that the opportunity for free political discussion

is "essential to the security of the republic." *Stromberg* v. *California*, 283 U. S. 359, 369. The present Chief Justice recently stated:

> "We are living in a world of ideas and are going through a war of ideas. Everywhere there is a contest for the hearts and minds of men.
>
> "Every political concept is under scrutiny. Our American system like all others is on trial both at home and abroad. The way it works; the manner in which it solves the problems of our day; the extent to which we maintain the spirit of our Constitution with its Bill of Rights, will in the long run do more to make it both secure and the object of adulation than the number of hydrogen bombs we stockpile." (Address before the American Bar Association, 40 A. B. A. Jour. 955.) [153]

The Act was enacted in the summer of 1950, when "the Western world as a whole believed that Korea was the opening campaign of the third world war." [154] This was the political estimate that underlay its enactment. Yet many Americans, including the President, opposed the Act, rightly recognizing that in times of crisis it is essential to the national security to protect fundamental freedoms against false appeals to expediency.

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[153] Cf. Lincoln: "What constitutes the bulwark of our liberty and independence? It is not our frowning battlements, our bristling sea-coasts; our army and our navy. These are not our reliance against tyranny. All of those may be turned against us without making us weaker for the struggle. Our reliance is in the Love of Liberty which God has planted in us. Our defense is in the spirit which prized liberty as the heritage of all men, in all lands everywhere. Destroy this spirit and you have planted the seeds of despotism at your doors. Familiarize yourselves with the chains of bondage, and you prepare your own limbs to wear them. Accustomed to trample on the rights of others, you have lost the genius of your own independence and become the fit subjects of the first cunning tyrant who rises among you." *Collected Works*, Rutgers Univ. Press, v. 3, p. 95.

[154] Walter Lippman, N. Y. Herald Tribune, Nov. 11, 1952.

Under no circumstances could the national security have been promoted by the wholesale sacrifice of civil liberties and rise of McCarthyism which resulted from the cold war and the hot war in Korea. Moreover, the justification for the onslaught on the Constitution has proved unfounded. A truce was negotiated in Korea. International tensions have relaxed. The leaders of the West and the Soviet Union are exploring avenues and establishing procedures for the peaceful settlement of differences. The President has stated, on the basis of his experiences at Geneva, that Soviet leaders are as sincere as he in their desire for peace.[155] Each of the four heads of state at Geneva declared his belief that the new spirit of conciliation makes a lasting peace a hopeful and realistic possibility.[156] This perspective of peaceful coexistence of the two systems is incompatible with the premise of the Act, spelled out in section 2.[157]

In a period of "competitive co-existence,"[158] no government which infringes the fundamental liberties of its citizens can hope to win the respect and confidence of other peoples. A decision sustaining the Act and the order of the Board would sacrifice our heritage of freedom and ir-

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[155] N. Y. Times, July 21, 1955.

[156] N. Y. Times, July 24, 1955.

[157] See Toynbee, *The Question: Can Russia Really Change?* N. Y. Times Magazine, July 24, 1955. Walter Lippman has recently written: "If Geneva means that the great powers are agreed that they will not use force to change the existing situations, then they are agreed on something of the highest substance which they have never agreed upon before. Such an acceptance of the military stalemate will compel us to rethink a number of our ideas. One of the first will be the assumption that the revolutionary movements all over the globe originate in Moscow, are directed from Moscow and would fold up if Moscow could be made to behave. That is not true." N. Y. Herald Tribune, Aug. 16, 1955. For an earlier and similar estimate, see Kennan, *Realities of American Foreign Policy* (1954), pp. 42, 85.

[158] James Reston, N. Y. Times, Nov. 24, 1954.

retrievably handicap the nation in the "contest for the hearts and minds of men."

The decision below should be reversed.

Respectfully submitted,

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APPENDIX—STATUTES INVOLVED

1. Subversive Activities Control Act

The Internal Security Act of 1950, 64 Stat. 987, 50 U. S. C. 781 ff., as amended, provides in part as follows:

AN ACT

To protect the United States against certain un-American and subversive activities by requiring registration of Communist organizations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Internal Security Act of 1950".

TITLE I—SUBVERSIVE ACTIVITIES CONTROL

SECTION 1. (a) This title may be cited as the "Subversive Activities Control Act of 1950."

(b) Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect.

NECESSITY FOR LEGISLATION

SEC. 2. As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration

into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

(2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality.

(3) The system of government known as a totalitarian dictatorship is characterized by the existence of a single political party, organized on a dictatorial basis, and by substantial identity between such party and its policies and the government and governmental policies of the country in which it exists.

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

(5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

(6) The Communist action organizations so established and utilized in various countries, acting under

such control, direction, and discipline, endeavor to carry out the objective of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves.

(7) In carrying on the activities referred to in paragraph (6), such Communist organizations in various countries are organized on a secret, conspiratorial basis and operate to a substantial extent through organizations, commonly known as "Communist fronts", which in most instances are created and maintained, or used, in such manner as to conceal the facts as to their true character and purposes and their membership. One result of this method of operation is that such affiliated organizations are able to obtain financial and other support from persons who would not extend such support if they knew the true purposes of, and the actual nature of the control and influence exerted upon, such "Communist fronts".

(8) Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.

(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

(10) In pursuance of communism's stated objectives, the most powerful existing Communist dictatorship has, by the methods referred to above, already caused the establishment in numerous foreign countries of Communist totalitarian dictatorships, and threatens to establish similar dictatorships in still other countries.

(11) The agents of communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law.

(12) The Communist network in the United States is inspired and controlled in large part by foreign agents who are sent into the United States ostensibly as attaches of foreign legations, affiliates of international organizations, members of trading commissions, and in similar capacities, but who use their diplomatic or semi-diplomatic status as a shield behind which to engage in activities prejudicial to the public security.

(13) There are, under our present immigration laws, numerous aliens who have been found to be deportable, many of whom are in the subversive, criminal, or immoral classes who are free to roam the country at will without supervision or control.

(14) One device for infiltration by Communists is by procuring naturalization for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society.

(15) The Communist movement in the United States is an organization numbering thousands of adherents,

rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparation by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such worldwide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

DEFINITIONS

SEC. 3. For the purposes of this title—

(1) The term "person" means an individual or an organization.

(2) The term "organization" means an organization, corporation, company, partnership, association, trust foundation, or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together for joint action on any subject or subjects.

(3) The term "Communist-action organization" means—

(a) any organization in the United States (other than a diplomatic representative or mission of a for-

eign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; and

(b) any section, branch, fraction, or cell of any organization defined in subparagraph (a) of this paragraph which has not complied with the registration requirements of this title.

(4) The term "Communist-front organization" means any organization in the United States (other than a Communist-action organization as defined in paragraph (3) of this section) which (A) is substantially directed, dominated, or controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 2 of this title.

(4A) The term "Communist-infiltrated organization" means any organization in the United States (other than a Communist-action organization or a Communist-front organization) which (A) is substantially directed, dominated, or controlled by an individual or individuals who are, or who within three years have been actively engaged in, giving aid or support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 2 of this title, and (B) is serving, or within three years has served, as a means for (i) the giving of aid or support to any such organization, government, or movement, or (ii) the impairment of the military strength of the United States or its industrial capacity to furnish logistical or other material support required by its Armed Forces: *Provided, however*, That any labor organization which is an affiliate

in good standing of a national federation or other labor organization whose policies and activities have been directed to opposing Communist organizations, any Communist foreign government, or the world Communist movement, shall be presumed prima facie not to be a "Communist-infiltrated organization." [1]

(5) The term "Communist organization" means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization.[2]

(6) The term "to contribute funds or services" includes the rendering of any personal service and the making of any gift, subscription, loan, advance, or deposit, of money or of anything of value, and also the making of any contract, promise, or agreement to contribute funds or services, whether or not legally enforcible.

(7) The term "facility" means any plant, factory or other manufacturing, producing or service establishment, airport, airport facility, vessel, pier, water-front facility, mine, railroad, public utility, laboratory, station, or other establishment or facility, or any part, division, or department of any of the foregoing. The term "defense facility" means any facility designated and proclaimed by the Secretary of Defense pursuant to section 5(b) of this title and included on the list published and currently in effect under such subsection, and which is in compliance with the provisions of such subsection respecting the posting of notice of such designation.

(8) The term "publication" means any circular, newspaper, periodical, pamphlet, book, letter, post card, leaflet, or other publication.

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[1] Added by sec. 7(a) of the Communist Control Act of 1954, 68 Stat. 777.

[2] As amended by sec. 7(b) of the Communist Control Act of 1954, 68 Stat. 778.

(9) The term "United States", when used in a geographical sense, includes the several States, Territories, and possessions of the United States, the District of Columbia, and the Canal Zone.

(10) The term "interstate or foreign commerce" means trade, traffic, commerce, transportation, or communication (A) between any State, Territory, or possession of the United States (including the Canal Zone), or the District of Columbia, and any place outside thereof, or (B) within any territory or possession of the United States (including the Canal Zone), or within the District of Columbia.

(11) The term "Board" means the Subversive Activities Control Board created by section 12 of this title.

(12) The term "final order of the Board" means an order issued by the Board under section 13 of this title, which has become final as provided in section 14 of this title.

(13) The term "advocates" includes advises, recommends, furthers by overt act, and admits belief in; and the giving, loaning, or promising of support or of money or anything of value to be used for advocating any doctrine shall be deemed to constitute the advocating of such doctrine.

(14) The term "world communism" means a revolutionary movement, the purpose of which is to establish eventually a Communist totalitarian dictatorship in any or all the countries of the world through the medium of an internationally coordinated Communist movement.

(15) The terms "totalitarian dictatorship" and "totalitarianism" mean and refer to systems of government not representative in fact, characterized by (A) the existence of a single political party, organized on a dictatorial basis, with so close an identity between such party and its policies

and the governmental policies of the country in which it exists, that the party and the government constitute an indistinguishable unit, and (B) the forcible suppression of opposition to such party.

(16) The term "doctrine" includes, but is not limited to, policies, practices, purposes, aims, or procedures.

(17) The giving, loaning, or promising of support or of money or any other thing of value for any purpose to any organization shall be conclusively presumed to constitute affiliation therewith; but nothing in this paragraph shall be construed as an exclusive definition of affiliation.

(18) "Advocating the economic, international, and governmental doctrines of world communism" means advocating the establishment of a totalitarian Communist dictatorship in any or all of the countries of the world through the medium of an internationally coordinated Communist movement.

(19) "Advocating the economic and governmental doctrines of any other form of totalitarianism" means advocating the establishment of totalitarianism (other than world communism) and includes, but is not limited to, advocating the economic and governmental doctrines of fascism and nazism.

CERTAIN PROHIBITED ACTS

SEC. 4. (a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 3 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

(b) It shall be unlawful for any officer or employee of the United States or of any department or agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, to communicate in any manner or by any means, to any other person whom such officer or employee knows or has reason to believe to be an agent or representative of any foreign government or an officer or member of any Communist organization as defined in paragraph (5) of section 3 of this title, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, knowing or having reason to know that such information has been so classified, unless such officer or employee shall have been specifically authorized by the President, or by the head of the department, agency, or corporation by which this officer or employee is employed, to make such disclosure of such information.

(c) It shall be unlawful for any agent or representative of any foreign government, or any officer or member of any Communist organization as defined in paragraph (5) of section 3 of this title, knowingly to obtain or receive, or attempt to obtain or receive, directly or indirectly, from any officer or employee of the United States or of any department or agency thereof or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, unless special authorization for such communication shall first have been obtained from the head of the department, agency, or corporation having custody of or control over such information.

(d) Any person who violates any provision of this section shall, upon conviction thereof, be punished by a fine of not more than $10,000, or imprisonment for not more than ten years, or by both such fine and such imprisonment, and shall, moreover, be thereafter ineligible to hold any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

(e) Any person may be prosecuted, tried, and punished for any violation of this section at any time within ten years after the commission of such offense, notwithstanding the provisions of any other statute of limitations: *Provided*, That if at the time of the commission of the offense such person is an officer or employee of the United States or of any department or agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, such person may be prosecuted, tried, and punished for any violation of this section at any time within ten years after such person has ceased to be employed as such officer or employee.

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 7 or section 8 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

EMPLOYMENT OF MEMBERS OF COMMUNIST ORGANIZATIONS

SEC. 5. (a) When a Communist organization, as defined in paragraph (5) of section 3 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(A) in seeking, accepting, or holding any nonelective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or

(B) to hold any nonelective office or employment under the United States; or

(C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility; or

(E) [3] to hold office or employment with any labor organization, as that term is defined in section 2(5) of the National Labor Relations Act, as amended (29 U. S. C. 152), or to represent any employer in any matter or proceeding arising or pending under that Act.

(2) For any officer or employee of the United States or of any defense facility, with knowledge or notice that such organization is so registered or that such order has become final—

(A) to contribute funds or services to such organization; or

(B) to advise, counsel or urge any person, with knowledge or notice that such person is a member of such organization, to perform, or to omit to perform, any act if such act or omission would consti-

[3] Added by sec. 6 of the Communist Control Act of 1954, 68 Stat. 777.

tute a violation of any provision of subparagraph (1) of this subsection.

(b) The Secretary of Defense is authorized and directed to designate and proclaim, and from time to time revise, a list of facilities, as defined in paragraph (7) of section 3 of this title, with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions of subsection (a) of this section. The Secretary shall cause such list as designated and proclaimed, or any revision thereof, to be promptly published in the Federal Register, and shall promptly notify the management of any facility so listed; whereupon such management shall immediately post conspicuously, and thereafter while so listed keep posted, notice of such designation in such form and in such place or places as to give reasonable notice thereof to all employees of, and to all applicants for employment in, such facility.

(c) [4] As used in this section, the term "member" shall not include any individual whose name has not been made public because of the prohibition contained in section 9(b) of this title.

DENIAL OF PASSPORTS TO MEMBERS OF COMMUNIST ORGANIZATIONS

SEC. 6. (a) When a Communist organization as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

[4] Repealed by sec. 7(c) of the Communist Control Act of 1954, 68 Stat. 778.

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization.

(c) [5] As used in this section, the term "member" shall not include any individual whose name has not been made public because of the prohibition contained in section 9(b) of this title.

REGISTRATION AND ANNUAL REPORTS OF COMMUNIST ORGANIZATIONS

SEC. 7. (a) Each Communist-action organization (including any organization required, by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-action organization.

(b) Each Communist-front organization (including any organization required, by a final order of the Board, to register as a Communist-front organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-front organization.

(c) The registration required by subsection (a) or (b) shall be made—

[5] See footnote 4.

(1) in the case of an organization which is a Communist-action organization or a Communist-front organization on the date of the enactment of this title, within thirty days after such date;

(2) in the case of an organization becoming a Communist-action organization or a Communist-front organization after the date of the enactment of this title, within thirty days after such organization becomes a Communist-action organization or a Communist-front organization, as the case may be; and

(3) in the case of an organization which by a final order of the Board is required to register, within thirty days after such order becomes final.

(d) The registration made under subsection (a) or (b) shall be accompanied by a registration statement, to be prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the following information:

(1) The name of the organization and the address of its principal office.

(2) The name and last-known address of each individual who is at the time of filing of such registration statement, and of each individual who was at any time during the period of twelve full calendar months next preceding the filing of such statement, an officer of the organization, with the designation or title of the office so held, and with a brief statement of the duties and functions of such individual as such officer.

(3) An accounting, in such form and detail as the Attorney General shall by regulations prescribe, of all moneys received and expended (including the sources from which received and the purposes for which expended) by the organization during the period of twelve full calendar months next preceding the filing of such statement.

(4) In the case of a Communist-action organization, the name and last-known address of each individual who was a member of the organization at any time during the period of twelve full calendar months preceding the filing of such statement.

(5) In the case of any officer or member whose name is required to be shown in such statement, and who uses or has used or who is or has been known by more than one name, each name which such officer or member uses or has used or by which he is known or has been known.

(6) A listing, in such form and detail as the Attorney General shall by regulation prescribe, of all printing presses and machines including but not limited to rotary presses, flatbed cylinder presses, platen presses, lithographs, offsets, photo-offsets, mimeograph machines, multigraph machines, multilith machines, duplicating machines, ditto machines, linotype machines, intertype machines, monotype machines, and all other types of printing presses, typesetting machines or any mechanical devices used or intended to be used, or capable of being used to produce or publish printed matter or material, which are in the possession, custody, ownership, or control of the Communist-action or Communist-front organization or its officers, members, affiliates, associates, group, or groups in which the Communist-action or Communist-front organization, its officers or members have an interest.[6]

(e) It shall be the duty of each organization registered under this section to file with the Attorney General on or before February 1 of the year following the year in which it registers, and on or before February 1 of each succeeding year, an annual report, prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the same information which by sub-

[6] Added by P. L. 557, 83d Cong., 2d Sess., 68 Stat. 586.

section (d) is required to be included in a registration statement, except that the information required with respect to the twelve-month period referred to in paragraph (2), (3), or (4) of such subsection shall, in such annual report, be given with respect to the calendar year preceding the February 1 on or before which such annual report must be filed.

(f)(1) It shall be the duty of each organization registered under this section to keep, in such manner and form as the Attorney General shall by regulations prescribe, accurate records and accounts of moneys received and expended (including the sources from which received and purposes for which expended) by such organization.

(2) It shall be the duty of each Communist-action organization registered under this section to keep, in such manner and form as the Attorney General shall by regulations prescribe, accurate records of the names and addresses of the members of such organization and of persons who actively participate in the activities of such organization.

(g) It shall be the duty of the Attorney General to send to each individual listed in any registration statement or annual report, filed under this section, as an officer or member of the organization in respect of which such registration statement or annual report was filed, a notification in writing that such individual is so listed; and such notification shall be sent at the earliest practicable time after the filing of such registration statement or annual report. Upon written request of any individual so notified who denies that he holds any office or membership (as the case may be) in such organization, the Attorney General shall forthwith initiate and conclude at the earliest practicable time an appropriate investigation to determine the truth or falsity of such denial, and, if the Attorney General shall be satisfied that such denial is correct, he shall thereupon strike from such registration statement or annual report the name of such individual. If the Attorney General shall decline or fail to strike the name of such individual from

such registration statement or annual report within five months after receipt of such written request, such individual may file with the Board a petition for relief pursuant to section 13(b) of this title.

(h) In the case of failure on the part of any organization to register or to file any registration statement or annual report as required by this section, it shall be the duty of the executive officer (or individual performing the ordinary and usual duties of an executive officer) and of the secretary (or individual performing the ordinary and usual duties of a secretary) of such organization, and of such officer or officers of such organization as the Attorney General shall by regulations prescribe, to register for such organization, to file such registration statement, or to file such annual report, as the case may be.

REGISTRATION OF MEMBERS OF COMMUNIST-ACTION ORGANIZATIONS

SEC. 8. (a) Any individual who is or becomes a member of any organization concerning which (1) there is in effect a final order of the Board requiring such organization to register under section 7(a) of this title as a Communist-action organization, (2) more than thirty days have elapsed since such order has become final, and (3) such organization is not registered under section 7 of this title as a Communist-action organization, shall within sixty days after said order has become final, or within thirty days after becoming a member of such organization, whichever is later, register with the Attorney General as a member of such organization.

(b) Each individual who is or becomes a member of any organization which he knows to be registered as a Communist-action organization under section 7(a) of this title, but to have failed to include his name upon the list of members thereof filed with the Attorney General, pursuant to the provisions of subsections (d) and (e) of section 7 of

this title, shall, within sixty days after he shall have obtained such knowledge, register with the Attorney General as a member of such organization.

(c) The registration made by any individual under subsection (a) or (b) of this section shall be accompanied by a registration statement to be prepared and filed in such manner and form, and containing such information, as the Attorney General shall by regulations prescribe.

KEEPING OF REGISTERS; PUBLIC INSPECTION; REPORTS TO PRESIDENT AND CONGRESS

SEC. 9. (a) The Attorney General shall keep and maintain separately in the Department of Justice—

(1) a "Register of Communist-Action Organizations", which shall include (A) the names and addresses of all Communist-action organizations registered under section 7, (B) the registration statements and annual reports filed by such organizations thereunder, and (C) the registration statements filed by individuals under section 8; and

(2) a "Register of Communist-Front Organizations", which shall include (A) the names and addresses of all Communist-front organizations registered under section 7, and (B) the registration statements and annual reports filed by such organizations thereunder.

(b) Such registers shall be kept and maintained in such manner as to be open for public inspection: *Provided*, That the Attorney General shall not make public the name of any individual listed in either such register as an officer or member of any Communist organization until sixty days shall have elapsed after the transmittal of the notification required by section 7 (g) to be sent to such individual, and if prior to the end of such period such individual shall make written request to the Attorney General for the re-

moval of his name from any such list, the Attorney General shall not make public the name of such individual until six months shall have elapsed after receipt of such request by the Attorney General, or until thirty days shall have elapsed after the Attorney General shall have denied such request and shall have transmitted to such individual notice of such denial, whichever is earlier.

(c) The Attorney General shall submit to the President and to the Congress on or before June 1 of each year (and at any other time when requested by either House by resolution) a report with respect to the carrying out of the provisions of this title, including the names and addresses of the organizations listed in such registers and (except to the extent prohibited by subsection (b) of this section) the names and addresses of the individuals listed as members of such organizations.

(d) Upon the registration of each Communist organization under the provisions of this title, the Attorney General shall publish in the Federal Register the fact that such organization has registered as a Communist-action organization, or as a Communist-front organization, as the case may be, and the publication thereof shall constitute notice to all members of such organization that such organization has so registered.

USE OF THE MAILS AND INSTRUMENTALITIES OF INTERSTATE OR FOREIGN COMMERCE

SEC. 10. It shall be unlawful for any organization which is registered under section 7, or for any organization with respect to which there is in effect a final order of the Board requiring it to register under section 7, or determining that it is a Communist-infiltrated organization,[1] or for any person acting for or on behalf of any such organization—

[1] Reference to Communist-infiltrated organizations added by sec. 8(a) of the Communist Control Act of 1954, 68 Stat. 778.

(1) to transmit or cause to be transmitted, through the United States mails or by any means or instrumentality of interstate or foreign commerce, any publication which is intended to be, or which it is reasonable to believe is intended to be, circulated or disseminated among two or more persons, unless such publication, and any envelope, wrapper, or other container in which it is mailed or otherwise circulated or transmitted, bears the following, printed in such manner as may be provided in regulations prescribed by the Attorney General, with the name of the organization appearing in lieu of the blank: "Disseminated by ————————, a Communist organization"; or

(2) to broadcast or cause to be broadcast any matter over any radio or television station in the United States, unless such matter is preceded by the following statement, with the name of the organization being stated in place of the blank: "The following program is sponsored by ————————, a Communist organization".

DENIAL OF TAX DEDUCTIONS AND EXEMPTIONS

SEC. 11. (a) Notwithstanding any other provisions of law, no deduction for Federal income-tax purposes shall be allowed in the case of a contribution to or for the use of any organization if at the time of the making of such contribution (1) such organization is registered under section 7, or (2) there is in effect a final order of the Board requiring such organization to register under section 7 or determining that it is a Communist-infiltrated organization.[8]

(b) No organization shall be entitled to exemption from Federal income tax, under section 101 of the Internal Revenue Code, for any taxable year if at any time during such taxable year (1) such organization is registered under section 7, or (2) there is in effect a final order of the Board

[8] See footnote 7.

requiring such organization to register under section 7 or determining that it is a Communist-infiltrated organization.[9]

SUBVERSIVE ACTIVITIES CONTROL BOARD

SEC. 12. (a) There is hereby established a board, to be known as the Subversive Activities Control Board, which shall be composed of five members, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three members of the Board shall be members of the same political party. The terms of office of the members of the Board in office on the date of enactment of the Subversive Activities Control Board Tenure Act shall expire at the time they would have expired if such Act had not been enacted. The term of office of each member of the Board appointed after the date of enactment of the Subversive Activities Control Board Tenure Act shall be for five years from the date of expiration of the term of his predecessor, except, that (1) the term of office of that member of the Board who is designated by the President and is appointed to succeed one of the two members of the Board whose terms expire on August 9, 1955 shall be for four years from the date of expiration of the term of his predecessor, and (2) the term of office of any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be for the remainder of the term of his predecessor. Upon the expiration of his term of office a member of the Board shall continue to serve until his successor shall have been appointed and shall have qualified.[9a] The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed

[9] See footnote 7.

[9a] Provisions relating to tenure amended by the Subversive Activities Control Board Tenure Act, P. L. 254, 84th Cong., 1st Sess., August 5, 1955.

by the President, upon notice and hearing; for neglect of duty or malfeasance in office, but for no other cause.

(b) Any vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and three members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to the Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees of the Board, and an account of all moneys it has disbursed.

(d) Each member of the Board shall receive a salary of $15,000 a year,[10] shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment.

(e) It shall be the duty of the Board——

(1) upon application made by the Attorney General under section 13(a) of this title, or by any organization under section 13(b) of this title, to determine whether any organization is a "Communist-action organization" within the meaning of paragraph (3) of section 3 of this title, or a "Communist-front organization" within the meaning of paragraph (4) of section 3 of this title; and

(2) upon application made by the Attorney General under section 13(a) of this title, or by any individual under section 13(b) of this title, to determine whether any individual is a member of any Communist-action organization registered, or by final order of the Board required to be registered, under section 7(a) of this title; and

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[10] Originally $12,500. Raised to present figure by Act of July 12, 1952. 66 Stat. 590, 50 U. S. C. Supp. 791(d).

(3) upon any application made under subsection (a) or subsection (b) of section 13A of this title, to determine whether any organization is a Communist-infiltrated organization.[11]

(f) Subject to the civil-service laws and Classification Act of 1949, the Board may appoint and fix the compensation of a chief clerk and such examiners and other personnel as may be necessary for the performance of its functions.

(g) The Board may make such rules and regulations, not inconsistent with the provisions of this title, as may be necessary for the performance of its duties.

(h) There are hereby authorized to be appropriated to the Board such sums as may be necessary to carry out its functions.

REGISTRATION PROCEEDINGS BEFORE BOARD[12]

SEC. 13. (a) Whenever the Attorney General shall have reason to believe that any organization which has not registered under subsection (a) or subsection (b) of section 7 of this title is in fact an organization of a kind required to be registered under such subsection, or that any individual who has not registered under section 8 of this title is in fact required to register under such section, he shall file with the Board and serve upon such organization or individual a petition for an order requiring such organization or individual to register pursuant to such subsection or section, as the case may be. Each such petition shall be verified under oath, and shall contain a statement of the facts upon which the Attorney General relies in support of his prayer for the issuance of such order.

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[11] Added by sec. 9(a) of the Communist Control Act of 1954, 68 Stat. 778.

[12] "Registration" added by sec. 9(b) of the Communist Control Act of 1954, 68 Stat. 778.

(b) Any organization registered under subsection (a) or subsection (b) of section 7 of this title, and any individual registered under section 8 of this title, may, not oftener than once in each calendar year, make application to the Attorney General for the cancellation of such registration and (in the case of such organization) for relief from obligation to make further annual reports. Within sixty days after the denial of any such application by the Attorney General, the organization or individual concerned may file with the Board and serve upon the Attorney General a petition for an order requiring the cancellation of such registration and (in the case of such organization) relieving such organization of obligation to make further annual reports. Any individual authorized by section 7(g) of this title to file a petition for relief may file with the Board and serve upon the Attorney General a petition for an order requiring the Attorney General to strike his name from the registration statement or annual report upon which it appears.

(c) Upon the filing of any petition pursuant to subsection (a) or subsection (b) of this section, the Board (or any member thereof or any examiner designated thereby) may hold hearings, administer oaths and affirmations, may examine witnesses and receive evidence at any place in the United States, and may require by subpena the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed relevant, to the matter under inquiry. Subpenas may be signed and issued by any member of the Board or any duly authorized examiner. Subpenas shall be issued on behalf of the organization or the individual who is a party to the proceeding upon request and upon a statement or showing of general relevance and reasonable scope of the evidence sought. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States at any designated place of hearing. Witnesses summoned shall be

paid the same fees and mileage paid witnesses in the district courts of the United States. In case of disobedience to a subpoena, the Board may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpena issued to any person, issue an order requiring such person to appear (and to produce documentary evidence if so ordered) and give evidence relating to the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. No person shall be held liable in any action in any court, State or Federal, for any damages resulting from (1) his production of any documentary evidence in any proceeding before the Board if he is required, by a subpena issued under this subsection, to produce the evidence; or (2) any statement under oath he makes in answer to a question he is asked while testifying before the Board in response to a subpena issued under this subsection, if the statement is pertinent to the question.

(d)(1) All hearings conducted under this section shall be public. Each party to such proceeding shall have the right to present its case with the assistance of counsel, to offer oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. An accurate stenographic record shall be taken of the testimony of each witness, and a transcript of such testimony shall be filed in the office of the Board.

(2) Where an organization or individual declines or fails to appear at a hearing accorded to such organization or individual by the Board pursuant to this section, the

Board may, without further proceedings and without the introduction of any evidence, enter an order requiring such organization or individual to register or denying the application of such organization or individual, as the case may be. Where in the course of any hearing before the Board or any examiner thereof a party or counsel is guilty of misbehavior which obstructs the hearing, such party or counsel may be excluded from further participation in the hearing.

(e) In determining whether any organization is a "Communist-action organization", the Board shall take into consideration—

(1) the extent to which its policies are formulated and carried out and its activities performed, pursuant to directives or to effectuate the policies of the foreign government or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement referred to in section 2 of this title; and

(2) the extent to which its views and policies do not deviate from those of such foreign government or foreign organization; and

(3) the extent to which it receives financial or other aid, directly or indirectly, from or at the direction of such foreign government or foreign organization; and

(4) the extent to which it sends members or representatives to any foreign country for instruction or training in the principles, policies, strategy, or tactics of such world Communist movement; and

(5) the extent to which it reports to such foreign government or foreign organization or to its representatives; and

(6) the extent to which its principal leaders or a substantial number of its members are subject to or

recognize the disciplinary power of such foreign government or foreign organization or its representatives; and

(7) the extent to which, for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives, (i) it fails to disclose, or resists efforts to obtain information as to, its membership (by keeping membership lists in code, by instructing members to refuse to acknowledge membership, or by any other method); (ii) its members refuse to acknowledge membership therein; (iii) it fails to disclose, or resists efforts to obtain information as to, records other than membership lists; (iv) its meetings are secret; and (v) it otherwise operates on a secret basis; and

(8) the extent to which its principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization.

(f) In determining whether any organization is a "Communist-front organization", the Board shall take into consideration—

(1) the extent to which persons who are active in its management, direction, or supervision, whether or not holding office therein, are active in the management, direction, or supervision of, or as representatives of, any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(2) the extent to which its support, financial or otherwise, is derived from any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(3) the extent to which its funds, resources, or personnel are used to further or promote the objectives of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(4) the extent to which the positions taken or advanced by it from time to time on matters of policy do not deviate from those of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2.

(g) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order requiring such organization to register as such under section 7 of this title; or

(2) that an individual is a member of a Communist-action organization (including an organization required by final order of the Board to register under section 7(a)), it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order requiring him to register as such under section 8 of this title.

(h) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue

and cause to be served upon the Attorney General an order denying his petition for an order requiring such organization to register as such under section 7 of this title; and send a copy of such order to such organization; or

(2) that an individual is not a member of any Communist-action organization, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order denying his petition for an order requiring such individual to register as such member under section 8 of this title; and send a copy of such order to such individual.

(i) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to cancel the registration of such organization and relieve it from the requirement of further annual reports; and send a copy of such order to such organization; or

(2) that an individual is not a member of any Communist-action organization, or (in the case of an individual listed as an officer of a Communist-front organization) that an individual is not an officer of a Communist-front organization, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to (A) strike the name of such individual from the registration statement or annual report upon which it appears or (B) cancel the

registration of such individual under section 8, as may be appropriate; and send a copy of such order to such individual.

(j) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order denying its petition for the cancellation of its registration and for relief from the requirement of further annual reports; or

(2) that an individual is a member of a Communist-action organization, or (in the case of an individual listed as an officer of a Communist-front organization) that an individual is an officer of a Communist-front organization, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order denying his petition for an order requiring the Attorney General (A) to strike his name from any registration statement or annual report on which it appears or (B) to cancel the registration of such individual under section 8, as the case may be.

(k) When any order of the Board requiring registration of a Communist organization becomes final under the provisions of section 14(b) of this title, the Board shall publish in the Federal Register the fact that such order has become final, and publication thereof shall constitute notice to all members of such organization that such order has become final.

PROCEEDINGS WITH RESPECT TO COMMUNIST-INFILTRATED ORGANIZATIONS

SEC. 13A.[13] (a) Whenever the Attorney General has reason to believe that any organization is a Communist-infiltrated organization, he may file with the Board and serve upon such organization a petition for a determination that such organization is a Communist-infiltrated organization. In any proceeding so instituted, two or more affiliated organizations may be named as joint respondents. Whenever any such petition is accompanied by a certificate of the Attorney General to the effect that the proceeding so instituted is one of exceptional public importance, such proceeding shall be set for hearing at the earliest possible time and all proceedings therein before the Board or any court shall be expedited to the greatest practicable extent.

(b) Any organization which has been determined under this section to be a Communist-infiltrated organization may, within six months after such determination, file with the Board and serve upon the Attorney General a petition for a determination that such organization no longer is a Communist-infiltrated organization.

(c) Each such petition shall be verified under oath, and shall contain a statement of the facts relied upon in support thereof. Upon the filing of any such petition, the Board shall serve upon each party to such proceeding a notice specifying the time and place for hearing upon such petition. No such hearing shall be conducted within twenty days after the service of such notice.

(d) The provisions of subsections (c) and (d) of section 13 shall apply to hearings conducted under this section, except that upon the failure of any organization named as a party in any petition filed by or duly served

[13] Added by sec. 10 of the Communist Control Act of 1954, 68 Stat. 778.

upon it pursuant to this section to appear at any hearing upon such petition, the Board may conduct such hearing in the absence of such organization and may enter such order under this section as the Board shall determine to be warranted by evidence presented at such hearing.

(e) In determining whether any organization is a Communist-infiltrated organization, the Board shall consider—

(1) to what extent, if any, the effective management of the affairs of such organization is conducted by one or more individuals who are, or within three [13a] years have been, (A) members, agents, or representatives of any Communist organization, and Communist foreign government, or the world Communist movement referred to in section 2 of this title, with knowledge of the nature and purpose thereof, or (B) engaged in giving aid or support to any such organization, government, or movement with knowledge of the nature and purpose thereof;

(2) to what extent, if any, the policies of such organization are, or within three years have been, formulated and carried out pursuant to the direction or advice of any member, agent, or representative of any such organization, government, or movement;

(3) to what extent, if any, the personnel and resources of such organization are, or within three years have been, used to further or promote the objectives of any such Communist organization, government, or movement;

(4) to what extent, if any, such organization within three years has received from, or furnished to or for the use of, any such Communist organization, government, or movement any funds or other material assistance;

[13a] Changed from two to three years by P. L. 173, 84th Cong., 1st Sess., July 26, 1955.

(5) to what extent, if any, such organization is, or within three years has been, affiliated in any way with any such Communist organization, government, or movement;

(6) to what extent, if any, the affiliation of such organization, or of any individual or individuals who are members thereof or who manage its affairs, with any such Communist organization, government, or movement is concealed from or is not disclosed to the membership of such organization; and

(7) to what extent, if any, such organization or any of its members or managers are, or within three years have been, knowingly engaged—

(A) in any conduct punishable under section 4 or 15 of this Act or under chapter 37, 105, or 115 of title 18 of the United States Code; or

(B) with intent to impair the military strength of the United States or its industrial capacity to furnish logistical or other support required by its armed forces, in any activity resulting in or contributing to any such impairment.

(f) After hearing upon any petition filed under this section, the Board shall (1) make a report in writing in which it shall state findings as to the facts and its conclusion with respect to the issues presented by such petition, (2) enter its order granting or denying the determination sought by such petition, and (3) serve upon each party to the proceeding a copy of such order. Any order granting any determination on the question whether any organization is a Communist-infiltrated organization shall become final as provided in section 14(b) of this Act.

(g) When any order has been entered by the Board under this section with respect to any labor organization or employer (as these terms are defined by section 2 of the National Labor Relations Act, as amended, and which are organizations within the meaning of section 3 of the Subversive Activities Control Act of 1950), the Board shall

serve a true and correct copy of such order upon the National Labor Relations Board and shall publish in the Federal Register a statement of the substance of such order and its effective date.

(h) When there is in effect a final order of the Board determining that any such labor organization is a Communist-action organization, a Communist-front organization, or a Communist-infiltrated organization, such labor organization shall be ineligible to—

(1) act as representative of any employee within the meaning or for the purposes of section 7 of the National Labor Relations Act, as amended (29 U. S. C. 157);

(2) serve as an exclusive representative of employees of any bargaining unit under section 9 of such Act, as amended (29 U. S. C. 159);

(3) make, or obtain any hearing upon, any charge under section 10 of such Act (29 U. S. C. 160); or

(4) exercise any other right or privilege, or receive any other benefit, substantive or procedural, provided by such Act for labor organizations.

(i) When an order of the Board determining that any such labor organization is a Communist-infiltrated organization has become final, and such labor organization theretofore has been certified under the National Labor Relations Act, as amended, as a representative of employees in any bargaining unit—

(1) a question of representation affecting commerce, within the meaning of section 9(c) of such Act, shall be deemed to exist with respect to such bargaining unit; and

(2) the National Labor Relations Board, upon petition of not less than 20 per centum of the employees in such bargaining unit or any person or persons act-

ing in their behalf, shall under section 9 of such Act (notwithstanding any limitation of time contained therein) direct elections in such bargaining unit or any subdivision thereof (A) for the selection of a representative thereof for collective bargaining purposes, and (B) to determine whether the employees thereof desire to rescind any authority previously granted to such labor organization to enter into any agreement with their employer pursuant to section 8(a) (3)(ii) of such Act.

(j) When there is in effect a final order of the Board determining that any such employer is a Communist-infiltrated organization, such employer shall be ineligible to—

(1) file any petition for an election under section 9 of the National Labor Relations Act, as amended (29 U. S. C. 157), or participate in any proceeding under such section; or

(2) make or obtain any hearing upon any charge under section 10 of such Act (29 U. S. C. 160); or

(3) exercise any other right or privilege or receive any other benefit, substantive or procedural, provided by such Act for employers.

JUDICIAL REVIEW

SEC. 14. (a) The party aggrieved by any order entered by the Board under subsection (g), (h), (i), or (j) of section 13, or subsection [14] (f) of section 13A, may obtain a review of such order by filing in the United States Court of Appeals for the District of Columbia, within sixty days from the date of service upon it of such order, a written petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the Board shall certify and

[14] Matter between commas added by section 11 of the Communist Control Act of 1954, 68 Stat. 780.

file in the court a transcript of the entire record in the proceeding, including all evidence taken and the report and order of the Board. Thereupon the court shall have jurisdiction of the proceeding and shall have power to affirm or set aside the order of the Board; but the court may in its discretion and upon its own motion transfer any action so commenced to the United States Court of Appeals for the circuit wherein the petitioner resides. The findings of the Board as to the facts, if supported by the preponderance of the evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the Board and to be adduced upon the proceeding in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by the preponderance of the evidence shall be conclusive, and its recommendations, if any, with respect to action in the matter under consideration. If the court shall set aside an order issued under subsection (j) of section 13 it may, in the case of an organization, enter a judgment canceling the registration of such organization and relieving it from the requirement of further annual reports, or in the case of an individual, enter a judgment requiring the Attorney General (A) to strike the name of such individual from the registration statement or annual report on which it appears, or (B) cancel the registration of such individual under section 8, as may be appropriate. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in title 28, United States Code, section 1254.

(b) Any order of the Board issued under section 13, or subsection (f) of section 13A,[15] shall become final—

[15] See footnote 14.

(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Board has been affirmed or the petition for review dismissed by a United States Court of Appeals, and no petition for certiorari has been duly filed; or

(3) upon the denial of a petition for certiorari, if the order of the Board has been affirmed or the petition for review dismissed by a United States Court of Appeals; or

(4) upon the expiration of ten days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Board be affirmed or the petition for review dismissed.

PENALTIES

SEC. 15. (a) If there is in effect with respect to any organization or individual a final order of the Board requiring registration under section 7 or section 8 of this title—

(1) such organization shall, upon conviction of failure to register, to file any registration statement or annual report, or to keep records as required by section 7, be punished for each such offense by a fine of not more than $10,000, and

(2) each individual having a duty under subsection (h) of section 7 to register or to file any registration statement or annual report on behalf of such organization, and each individual having a duty to register under section 8, shall, upon conviction of failure to so register or to file any such registration statement or annual report, be punished for each such offense by

a fine of not more than $10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

For the purposes of this subsection, each day of failure to register, whether on the part of the organization or any individual, shall constitute a separate offense.

(b) Any individual who, in a registration statement or annual report filed under section 7 or section 8, willfully makes any false statement or willfully omits to state any fact which is required to be stated, or which is necessary to make the statements made or information given not misleading, shall upon conviction thereof be punished for each such offense by a fine of not more than $10,000, or by imprisonment for not more than five years, or by both such fine and imprisonment. For the purposes of this subsection—

(1) each false statement willfully made, and each willful omission to state any fact which is required to be stated, or which is necessary to make the statements made or information given not misleading, shall constitute a separate offense; and

(2) each listing of the name or address of any one individual shall be deemed to be a separate statement.

(c) Any organization which violates any provision of section 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000. Any individual who violates any provision of section 5, 6, or 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment.

APPLICABILITY OF ADMINISTRATIVE PROCEDURE ACT

SEC. 16. Nothing in this title shall be held to make the provisions of the Administrative Procedure Act inapplicable to the exercise of functions, or the conduct of proceedings, by the Board under this title.

EXISTING CRIMINAL STATUTES

SEC. 17. The foregoing provisions of this title shall be construed as being in addition to and not in modification of existing criminal statutes.

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2. Immigration and Nationality Act

Pertinent provisions of sections 22 and 25 of the Subversive Activities Control Act have been carried forward in the Immigration and Nationality Act, 66 Stat. 163, adopted June 27, 1952, 8 U. S. C. secs. 1182, 1251, 1424, 1451, as follows:

SEC. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * * * *

(28) Aliens who are, or at any time have been, members of any of the following classes:

* * * * * * *

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and prior to the date upon

which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization.

SEC. 241. (a) Any alien in the United States (including any alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * * * *

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

* * * * * * *

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization.

SEC. 313. (a) Notwithstanding the provisions of section 405(b), no person shall hereafter be naturalized as a citizen of the United States—

* * * * * * *

(2) . . . (G) who, regardless of whether he is within any of the other provisions of this section, is a member of or affiliated with any Communist-action organization during the time it is registered or required to be registered under the provisions of section 7 of the Subversive Activities Control Act of 1950; or (H) who, regardless of whether he is within any of the other provisions of this section, is a member of or affiliated with any Communist-front organization dur-

ing the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such alien establishes that he did not have knowledge or reason to believe at the time he became a member of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist-front organization.

SEC. 340. * * * (c) If a person who shall have been naturalized after the effective date of this Act [16] shall within five years next following such naturalization become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded such person from naturalization under the provisions of section 313, it shall be considered prima facie evidence that such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively.

[16] The introductory clause of section 25(d) of the Act reads "If a person who shall have been naturalized after January 1, 1951 * * *."

3. Communist Control Act

The Communist Control Act of 1954, 68 Stat. 775, 50 U. S. C. 841-44, provides in part as follows:

FINDINGS OF FACT

SEC. 2. The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present con-

stitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed.

PROSCRIBED ORGANIZATIONS

SEC. 3. The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are hereby terminated: *Provided, however,* That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended.

SEC. 4. Whoever knowingly and willfully becomes or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes or objectives the establishment, control, conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political subdivision thereof, by the use of force or violence, with knowledge of the pur-

pose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a "Communist-action" organization.

(b) For the purposes of this section, the term "Communist Party" means the organization now known as the Communist Party of the United States of America, the Communist Party of any State or subdivision thereof, and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name thereof.

SEC. 5. In determining membership or participation in the Communist Party or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented, as to whether the accused person:

(1) Has been listed to his knowledge as a member in any book or any of the lists, records, correspondence, or any other document of the organization;

(2) Has made financial contribution to the organization in dues, assessments, loans, or in any other form;

(3) Has made himself subject to the discipline of the organization in any form whatsoever;

(4) Has executed orders, plans, or directives of any kind of the organization;

(5) Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the organization;

(6) Has conferred with officers or other members of the organization in behalf of any plan or enterprise of the organization;

(7) Has been accepted to his knowledge as an officer or member of the organization or as one to be called upon for services by other officers or members of the organization;

(8) Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans of the organization;

(9) Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization;

(10) Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization;

(11) Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the organization or to anyone else in behalf of the objectives of the organization;

(12) Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization;

(13) Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization;

(14) The enumeration of the above subjects of evidence on membership or participation in the Communist Party or any other organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated.

* * * * * * [17]

SEC. 12. If any provision of this title or the application thereof to any person or circumstances is held invalid, the remainder of the title, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

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[17] The omitted sections amend the Subversive Activities Control Act.